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1961

THE
CRIMINAL APPEAL REPORTS
1961

EDITED BY

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Recorder of Newark

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE ELWES

IVOR STEPHEN PARKER

1960
Oct. 10

Evidence — Wrongful Admission — Highly Prejudicial Matter — Defect not Curable by Direction to Jury — Refusal to Apply Proviso.

The appellant was charged with wounding his wife with intent to cause her grievous bodily harm. At the trial the licensee of the public-house where the incident which gave rise to the charge had taken place gave evidence for the prosecution. During his evidence, he said before he could be stopped, "She came in; her face was all bleeding, and she said, 'He shot me, he said he would.'" The judge did not hear the last remark and it seemed to counsel that the jury probably had not heard it. At the conclusion of the summing-up, when the jury were about to retire, a juror put a question to the judge which indicated that he had heard the whole of the aforementioned evidence. The judge did not discharge the jury, but gave them a strong direction that they were not to attach any weight to that evidence of the licensee.

Held, applying the test laid down by Lord Normand in LEJZOR TEPER *v.* R. [1952] A.C. 480, at p. 482, that the fair test in deciding whether the inadmissible evidence was so prejudicial and so likely to influence the jury that the matter could not be cured by the judge's direction was whether there was a probability that the improper admission of the evidence had turned the scale against the accused person; that in the present case there was a distinct danger that the jury had been influenced by the evidence to that extent; and that, therefore, the court could not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, but would quash the conviction.

Appeal against conviction.

The appellant was convicted at Staffordshire Assizes on July 1, 1960, of wounding with intent to do grievous bodily harm and was sentenced by Stable J. to eighteen months' imprisonment.

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Parker L.C.J., Ashworth J., Elwes J.

The appellant was alleged to have shot at his wife outside a public-house. The licensee of the public-house gave evidence for the prosecution and blurted out, before he could be stopped: "She came in; her face was all bleeding, and she said, 'He shot me, he said he would.'" The judge did not hear the last observation and counsel believed that the jury had not heard it. At the conclusion of the summing-up, when the jury were about to retire, a juror asked: "May a question be asked about the evidence of Mr. Head [the licensee]?" The judge said: "Certainly, what is it?" and the juror replied: "I recollect he quoted Mrs. Parker's words, 'He shot me, he said he would.'" The judge did not discharge the jury, but in his summing-up gave them a strong warning that they were not to attach any weight to those words of the licensee.

D. P. Draycott for the appellant. The evidence of the licensee with regard to the alleged statement by the appellant's wife was inadmissible and highly prejudicial to the defence. When it became clear that the remark had been heard by the jury the judge should have discharged the jury. It is conceded that the judge gave the jury a strong and perfectly proper direction on this evidence, but the mischief was too serious to be cured by any direction. [He referred to LEJZOR TEPER *v.* R. [1952] A.C. 480.]

C. S. Stuart-White for the Crown. It seems clear that the judge had not heard the prejudicial evidence and there were grounds for thinking that the jury had not heard it until the juror put the question to the judge at the conclusion of the summing-up. The judge gave the jury an extremely strong direction wholly to disregard the evidence and in the circumstances it is submitted that there has been no miscarriage of justice and that the court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

THE LORD CHIEF JUSTICE: The appellant was convicted at Staffordshire Assizes of wounding his wife with intent to cause her grievous bodily harm and was sentenced to eighteen months' imprisonment. From that conviction he appeals to this court by leave of the single judge.

So far as the facts of this curious case are concerned, it is enough to say that after a visit to a public-house and some quarrelling the appellant shot his wife at a distance of forty yards, nine pellets entering her face. At the trial his case was that the whole matter was an accident. How he came to have the gun in his hand, how it came to be loaded, how he hit her at forty yards, were all matters negativing accident; but accident was his defence, and he was entitled to have that defence left properly and impartially to the jury. One of the witnesses for the prosecution was a Mr. Head, the licensee of the public-house where the appellant and his wife had been, and he was the man to whom the wife went the moment after she was shot. In the course of his evidence he blurted out, before he could be stopped, these words: "She came in; her face was all bleeding, and she said, 'He shot me, he said he would.'" The last part of that evidence was clearly inadmissible. The judge, however, did not hear it. Counsel apparently heard it but raised no objection. No blame is to be attached to them, because they hoped that the jury had not heard it. Unfortunately it turned out, when the jury were about to retire, that they had heard it, because a juror said: "May a question be asked about the evidence of Mr. Head?" Stable J. said: "Certainly, what is it?" The juror said: "I recollect he quoted Mrs. Parker's words, 'He shot me, he said he would.'" Then counsel realised, as indeed did everybody, that, although the judge had not heard the observation, the jury had. Counsel suggested that in those circumstances the jury ought to be discharged. The judge, having finished his summing-up, felt that he could deal with the matter adequately by giving the jury a direction, and he gave them a direction that they were not to attach any weight at all to those words of Mr. Head. The jury, after being out for two and a half hours, found the appellant Guilty.

It seems to this court perfectly clear that, if the matter

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Parker L.C.J., Ashworth J., Elwes J.

had been drawn to the judge's attention when the words were spoken by Mr. Head he would have been almost bound, in the exercise of his discretion, to discharge the jury and order the prisoner to be retried. The question is whether, the matter having been raised at such a late stage, it could be dealt with by means of a direction such as the judge gave. Whether a direction of this sort will in any particular case cure the wrongful admission of evidence must, in the opinion of the court, be one of degree. There may be many cases where the inadmissible evidence is of such little weight or is liable to create so little prejudice that it would be right and proper that the matter should be dealt with by a direction to the jury. On the other hand, there are other cases where the inadmissible evidence is so prejudicial and so likely to influence the jury in arriving at their verdict that the court is reluctantly forced to the conclusion that the matter cannot be left to a direction, but must be dealt with by discharging the jury.

In the present case the words "He shot me, he said he would" are words which it would be almost impossible for the jury to put out of their minds not only in considering the defence of accident, but also in considering whether this was a case of wounding with intent or malicious wounding. In those circumstances this court feels that this evidence was wrongly admitted and that prima facie this conviction should be quashed. We were referred by Mr. Draycott to the decision of the Privy Council in LEJZOR TEPER *v.* R [1952] A.C. 480. At p. 492 Lord Normand said this: "The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant." Those words, it seems to this court, could be applied very aptly to this case and, adopting that test, it does feel that even with the judge's direction there was a distinct danger that the jury would be influenced by the evidence.

The only question, therefore, is whether the present case is one in which the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied. There is little doubt that

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the appellant's defence of accident was a difficult one. We are told, though this does not appear from the transcript, that the gun itself was produced at the trial and that it was a decrepit old hammer gun, the right barrel of which could easily go off by accident. On the other hand, the behaviour of the appellant after the event, and his failure to account for how he came to have the gun loaded in his hand and how it came to go off, are all matters which went to negative accident. The court, however, feel that in a case of this sort it is dangerous to consider to what conclusion the jury might have come if they had not heard this evidence from Mr. Head at all. Accordingly, the court feel that they cannot apply the proviso, and therefore the conviction is quashed.

Conviction quashed.

Solicitor: Ernest Brown & Co., Wednesbury, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY,
MR. JUSTICE BYRNE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE ELWES

SYDNEY ELMER GOLDER
ARTHUR PATRICK JONES
GEORGE ANTHONY PORRITT

1960
Oct. 3, 17

Evidence—Hostile Witness—Deposition—Summing-up—Previous Statement not to be Treated as Evidence.

When a witness is shown to have made a previous statement inconsistent with his evidence at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, but should also be directed that the previous statement, whether sworn or unsworn, does not constitute evidence on which they can act.

Conviction quashed where the summing-up indicated to the jury that it was open to them to act on the evidence contained

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in the deposition of a witness who had given evidence at the trial inconsistent with her deposition and, after being treated as a hostile witness, had not admitted that her original evidence on her deposition was true.

White (1922) 17 Cr.App.R. 59 and Harris (1927) 20 Cr. App.R. 144 followed.

Appeals against convictions.

The appellants were convicted at West Suffolk Quarter Sessions on July 7, 1960, of burglary and larceny and were sentenced by the Deputy-Chairman (His Honour Judge Southall), Golder to three years' imprisonment (consecutive to sentence already being served), Jones to three years' imprisonment and Porritt to eighteen months' imprisonment.

The appellants were convicted of breaking and entering a house at Newmarket and stealing a safe and its contents of the value of £1,500. At the magistrate's court a Mrs. Taylor deposed that the appellant Golder, whom she knew as "Chuck," had given her a watch which was identified as coming from the house. At the trial she still said that the watch had been given her by a man whom she knew as "Chuck," but she then denied that "Chuck" was the appellant Golder. The Deputy-Chairman gave the prosecution leave to treat Mrs. Taylor as a hostile witness, but she did not admit as a result of cross-examination that her original evidence on her deposition was true.

The Deputy-Chairman, in his summing-up, directed the jury: "The only evidence which you have that [Golder] gave the gold watch to Mrs. Taylor is the evidence of Mrs. Taylor herself, and she, you may think, is a stranger to truth. You heard the evidence before the justices. . . . If you come to the conclusion that what she said before the magistrates was accurate, then of course it all starts to tie up."

The appeals came before the court (Hilbery, Donovan and Winn JJ.) on July 26, when they were adjourned for a court of five judges.

Robin Simpson for the appellants. The Deputy-Chairman should have directed the jury that, in view of the contradictory

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evidence which she had given, the evidence of Mrs. Taylor was negligible and that they should decide the case on the other evidence. The jury should have been told what the purpose of admitting the deposition was, namely to discredit the witness, and that they could not act on her evidence before the magistrates as if it were evidence at the trial. The Deputy-Chairman, however, clearly told the jury that they could, if they chose, accept and act upon the evidence which Mrs. Taylor had given before the magistrates. The authorities of HARRIS (1927) 20 Cr.App.R. 144 and WHITE (1922) 17 Cr.App. R. 59 clearly support these contentions.

W. M. F. Hudson for the Crown. The Crown do not seek to go against the proposition well established on the authorities that evidence on a deposition is not evidence at the trial, though some qualification to the general rule was suggested in RUSSELL (1935) *The Times*, May 30, and REG. *v.* FRETT AND ROSA, tried at the Central Criminal Court in 1956; nor can it be argued that without the evidence of Mrs. Taylor the case against the appellants was more than one of great suspicion. Her evidence with regard to the watch was an essential link in the whole case.

At the conclusion of the arguments the Lord Chief Justice said that the court had come to the conclusion that the convictions would have to be quashed and would give their reasons at a later date.

Cur. adv. vult.

October 17. The judgment of the court was read by:

THE LORD CHIEF JUSTICE: These three appellants were tried at West Suffolk Quarter Sessions on an indictment containing two counts. In the first count all three men were charged with burglary and larceny, and in the second count Golder was separately charged with receiving a gold watch, part of the property referred to in the first count. All three appellants were found guilty on the first count and leave to appeal against conviction was granted in July last.

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Oct. 3, 17

SYDNEY ELMER GOLDER, ARTHUR PATRICK JONES, GEORGE ANTHONY PORRITT

Parker L.C.J., Hilbery J., Byrne J., Ashworth J., Elwes J.

The relevant facts may be summarised as follows: In the early hours of April 19, 1960, a dwelling-house in Newmarket was broken into and a quantity of property was removed, including a safe and a gold watch. At 5.35 a.m. a Standard Vanguard driven by the appellant Porritt with three passengers, one of whom was the appellant Jones, was stopped by the police near Ely, but after investigation was allowed to proceed. About two hours later the same car was seen by other police officers at Gayherne, still driven by Porritt, but on this occasion with only one passenger, alleged to be the appellant Golder. On the evening of April 19 the safe was discovered in a field near Newmarket where it had been broken open. Tyre marks were seen and careful measurements were taken by a police officer, who formed the opinion that they were made by the rear wheels of the vehicle. When the car driven by the appellant Porritt was examined some four days later, the front tyres were seen to be of a size and type which would have left marks exactly corresponding with those found in the field, but the tyres on the rear wheels were of a different size and type. There was no evidence to show that the tyres on the rear wheels had been changed in the intervening four days. The appellants Porritt and Jones gave an explanation to the police, purporting to account for their movements on the night in question, but that explanation was, to say the least of it, unimpressive. The appellant Golder denied throughout that he was in the Newmarket area, alleging that he was in Manchester.

As counsel for the prosecution frankly admitted, the foregoing evidence was not enough to do more than create a case of grave suspicion, and accordingly he sought to rely on a witness named Mrs. Taylor. Before the committing magistrates she swore that on April 20 the appellant Golder, whom she knew as " Chuck," had brought her a gold watch, which was in fact part of the property stolen in Newmarket early on the 19th. At the trial she went back on her story and counsel for the prosecution obtained leave to treat her as adverse and cross-examined her. He did not, however, succeed in extracting from her an admission that her deposition was true, still less that it was the appellant Golder who handed her the gold watch.

In the course of his summing-up the learned Deputy-Chairman dealt with the question of the watch and the conflicting testimonies of Mrs. Taylor in a way which plainly indicated to the jury that it was open to them to act upon the evidence contained in her deposition notwithstanding her repudiation of it. The whole of the deposition was in fact read to them when they returned for further direction. It is only necessary to refer to two passages in the summing-up: "The only evidence which you have that he gave the gold watch to Mrs. Taylor is the evidence of Mrs. Taylor herself, and she, you may think, is a stranger to truth. You heard the evidence before the justices." Later, he said: "If you come to the conclusion that what she said before the magistrates was accurate, then of course it all starts to tie up."

In the judgment of this court the direction to the jury in regard to Mrs. Taylor's deposition was wrong in law and, as was intimated at the end of the hearing of the appeals, all three convictions must be quashed. A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein. It is unnecessary to refer to the cases in detail; the following extract from the judgment of this court in HARRIS (1927) 20 Cr.App.R. 144, at pp. 147–148, is a sufficient statement of the principle: "It was permissible to cross-examine this girl upon the assertions she had previously made, not for the purpose of substituting those unsworn assertions for her sworn testimony, but for the purpose of showing that her sworn testimony, in the light of those unsworn assertions, could not be regarded as being of importance. It is upon that matter that confusion has sometimes arisen. It has undoubtedly sometimes been thought that where a witness is cross-examined upon a previous unsworn statement and admits that the statement was made,

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but says that the statement was untrue, that unsworn statement may sometimes be treated as if it could be accepted by the jury in preference to the sworn statement in the witness-box. . . . That, of course, is all wrong, as has been pointed out on various occasions by this court, and not least in the case of WHITE (1922) 17 Cr.App.R. 59."

In both HARRIS (*supra*) and WHITE (*supra*) the previous statement was unsworn and not made in the presence of the accused. It could not, therefore, on any view be evidence against him. The principle, however, is equally applicable to earlier statements made on oath as it is to unsworn statements: *cf.* BIRCH (1924) 18 Cr.App.R. 26.

Our attention was, however, drawn to the decision of this court in RUSSELL, unreported save in *The Times* newspaper of May 30, 1935, and it was suggested that that case had laid down a qualification to the general principle above stated, to the effect that if there was other evidence before the jury tending to show that the previous statement represented the truth, they were entitled to rely upon it. This court can see no warrant for any such qualification, which indeed would mean that evidence which was clearly inadmissible would on proof of the other evidence thereupon become admissible. Indeed, as we understand it, the court in RUSSELL (*supra*) was not laying down any such proposition.

We were also referred to the unreported case of REG. *v.* FRETT AND ROSA, tried by Donovan J., as he then was, at the Central Criminal Court in 1956. It was a razor-slashing case in which the victim, a man called Carter, and his wife had unhesitatingly picked out their assailants at an identification parade. At the trial, however, they said that they were not sure and that the defendants merely resembled their assailants. The learned judge left it to the jury to decide whether they could safely rely upon the original identification, and the jury convicted. That, however, was, as it seems to us, quite a different case from that now under consideration. In particular, it was unnecessary to treat the Carters as adverse witnesses and they were not so treated.

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In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.

As already stated, the circumstances of the present case were such as to arouse grave suspicion but, having regard to the fact that the jury were invited to act, and in all probability did act, upon material on which in law they could not act, this court is left with no alternative but to quash the convictions.

Convictions quashed.

Solicitors: Ludlow, Head & Walter for the second appellant; Moodie, Randall, Carr & Miles, agents for Bankes, Ashton & Hayward, Stowmarket, for the Crown.

BEFORE

MR. JUSTICE PILCHER, MR. JUSTICE PAULL AND
MR. JUSTICE FENTON ATKINSON

EDWARD CHARLES DAVEY
OWEN MORRIS DAVEY

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Jury—Need for Unanimity—Direction of Judge.
Indictment—Conspiracy—" Rolled Up " Charge.

A jury were directed by the judge, on the question of the necessity of unanimity, in the following terms: " . . . I always say, and it is true, you all have to agree before you can find anybody guilty, and there is no reason I know of why any judge should worry about that, from my experience, because whereas in lots of your own affairs on committees you do not always agree, nevertheless those of you who have experience of board meetings may find that again and again agreement is reached

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and no vote taken, and hardly ever is a vote taken at a board meeting, and juries seriously realising what they are doing are united by a passion for the right verdict, a passion for stern or real justice, if you like, and the result, I should think, is that in ninety-nine cases out of 100 there is not a disagreement at all, but solidarity and sense."

Held, that the above direction amounted to a misdirection in that it might have left the jury with the impression that the necessity for unanimity had now been in some measure relaxed, or that a juror, although he himself was still in a state of uncertainty, was entitled to sink his own view and agree with the majority of his colleagues, and that the misdirection necessitated the quashing of the convictions.

MILLS (1939) 27 Cr.App.R. 80; [1939] 2 K.B. 90 and WALHEIN (1952) 36 Cr.App.R. 167 followed.

Dictum of Lord Goddard C.J. in WALHEIN (1952) 36 Cr. App.R. at p. 168 explained.

A count for conspiracy charged seven persons with having over a period of eleven years conspired to cheat and defraud the creditors of a large number of companies. Some of the persons charged had nothing to do with the affairs of some of the companies involved and some of the companies had been wound up before some of the persons charged appeared on the scene.

Held, that a " rolled-up " charge of conspiracy of this kind was bad in law.

WEST AND OTHERS (1948) 32 Cr.App.R. 152; [1948] 1 K.B. 709 and DAWSON (1960) 44 Cr.App.R. 87; [1960] 1 W.L.R. 163 followed.

Appeals against convictions and sentences.

The appellants were convicted at the Central Criminal Court on January 18, 1960. Both appellants were convicted of conspiring to defraud creditors of companies and the appellant Owen Morris Davey also on four charges of false pretences, four charges of fraudulent conversion, one charge of causing a cheque to be delivered by virtue of a forged instrument, and two charges of circulating false statements with regard to the affairs of companies. They were sentenced by the Commissioner (Judge Maude, Q.C.), Edward Charles Davey to fifteen months' imprisonment and Owen Morris Davey to consecutive terms of imprisonment amounting in all to seven years.

The trial lasted forty-two days. There were 110 witnesses, forty-eight of whom gave evidence orally, and 483 exhibits. Speeches lasted for five days and the summing-up for four days. The direction of the judge on the necessity for a unanimous verdict on the part of the jury appears in the headnote and in the summing-up.

Count 1, which related to the charge of conspiracy, alleged a conspiracy between the two appellants and five other persons that, on divers days between June 6, 1947, and June 30, 1958, they conspired to cheat and defraud the creditors of fourteen companies, the names of some of which were altered from time to time over the years. Some of the persons charged were in no way connected with some of the companies, and some of the companies had been wound up before some of the persons charged appeared on the scene.

W. A. Sime, Q.C., and *J. W. A. Sloss* for the first appellant.

E. D. Sutcliffe, Q.C., and *Edward Eyre* for the second appellant.

Malcolm Morris, Q.C., and *Sidney Noakes* for the Crown.

Pilcher J.: The appellants in this case, Owen Morris Davey and Edward Charles Davey, who are father and son, appeal by leave of this court against their convictions and sentences, which were as follows: Owen Morris Davey was convicted before the Commissioner, Judge Maude, at the Central Criminal Court in January 1960 on count 1 of an indictment which contained nineteen counts. Count 1 was a charge of conspiracy to defraud in terms to which I will refer briefly presently; he was also convicted upon eleven other counts, four being in respect of false pretences, four in respect of fraudulent conversion, one for causing a cheque to be delivered by virtue of a forged instrument, and two for circulating false statements in regard to the affairs of certain companies with which he was connected. He was sentenced by the judge to two years, two years, two years and one year consecutively, making a total sentence of seven years. His son, Edward Charles Davey, was convicted on count 1 only, namely, the conspiracy charge, and was sentenced to fifteen months' imprisonment on that count. Both appellants appeal by leave of this court, which was given in July 1960, against their convictions and sentences.

Count 1, which was the conspiracy charge, as finally and formally amended, alleged a conspiracy between the two appellants and five other persons that, on divers days between June 6, 1947, and June 30, 1958, they conspired to cheat and defraud the creditors of some fourteen companies, the names of some of which were altered from time to time over the years. Besides the two appellants, a man named White was found guilty on this count and was sentenced to a term of imprisonment of nine months, which he has now served, as he did not present any appeal either against his conviction or his sentence.

The case which the Commissioner had to try was a long and very troublesome one, involving consideration by the jury of complicated facts extending over a long period. The hearing extended in all for more than two months, and the judge's summing-up extended over four days. Having been granted leave to appeal on September 26, 1960, Owen Morris Davey presented certain grounds of appeal which were as follows: "(1) The learned judge misdirected the jury in that he stated or implied that there was no need or no longer need for the jury to be unanimous in their verdict. (2) The learned judge failed to direct the jury upon the evidence relevant to count 1. (3) Count 1 of the indictment was bad in law in that separate conspiracies were therein charged as one conspiracy. (4) The inclusion of the charge of conspiracy in the indictment was unfair to the accused in that it inordinately prolonged the trial and impeded the defence with prejudicial evidence that would otherwise have been inadmissible." It will be seen that grounds 1 and 4 are comprehensive and, if established, would entitle this court to allow the appeal of both appellants on all counts. Grounds 2 and 3 are directed specifically to the conspiracy charge, ground 2 alleging misdirection by the judge, and ground 3 alleging that the count as framed was bad in law.

Now, it is clear from a perusal of the summing-up in this case and such of the evidence as we have seen, which has not been a great deal, that the case for the prosecution was that Owen Morris Davey was the prime mover in the alleged conspiracy to defraud which lasted over a long period. He was a man who all his life had been interested in the shopfitting and building trades, and from time to time he dealt with all the various persons who were charged with him as co-conspirators under count 1. The case for the prosecution was that he was a completely unscrupulous man who, with the assistance of others who joined him from time to time in the conspiracy, some for longer periods and some for shorter periods, over a period of eleven years in all, had enriched himself primarily, and his family, by a number of extremely ingenious frauds involving the use, sometimes contemporaneously and sometimes successively, of over a dozen different limited liability companies, and some registered businesses, whereby the creditors and the shareholders of these companies and businesses had been defrauded. His son, Edward Charles Davey, had been working with him from the start, as a young man originally. He was a draughtsman and acted as secretary to a number of companies, and he was one of the persons charged as a conspirator with his father on the ground that he had been privy to most, if not all, of the offences of which his father was found guilty, and in respect of which his father was said to have conspired.

That is the background of this case, and the first ground of appeal, as I have said, was that the judge misdirected the jury on the question of unanimity. I will read the judge's observations to the jury on that point. Having dealt generally with what I may call the preliminaries, he says this: " Sometimes in the past judges used to tell the juries that they have to be unanimous, but I always say—and it is true—you all have to agree before you can find anybody guilty, and there is no reason I know of why any judge should worry about that, from my experience, because whereas in lots of your own affairs, on committees, you do not always agree, nevertheless those of you who have experience of board meetings may find that again and again agreement is reached and no vote is taken, and hardly ever is a vote taken at a board meeting, and juries seriously realising what they are doing are united by a passion for the right verdict, a passion for stern or real justice, if you like, and the result, I should think, is that in ninety-nine cases out of one hundred there is not a disagreement at all, but solidarity and sense."

Before I deal with that particular passage I may be allowed, on behalf of the court, to make one or two preliminary observations. It seems to us that the ordinary juror who reads the newspapers is probably aware that, before a verdict of Guilty or Not Guilty can be reached, every member of the jury has to agree with his fellow jurors upon the verdict, which is the verdict of the jury as a whole. Each individual juror when empanelled and sworn takes a personal oath to render a true verdict according to the evidence. It sometimes happens that a judge assumes that the members of the jury are aware of this fundamental necessity and omits to mention in his summing-up that the verdict of the jury on the issue of guilt or innocence must be unanimous. More often, during the summing-up, having dealt with the question of the burden of proof, he simply reminds the jury that the verdict must be unanimous and that each of them must be satisfied upon the evidence whether guilt has been established or not. On occasion juries, having deliberated for some time, ask for further guidance on some particular point upon which they have difficulty in arriving at a unanimous conclusion, whereupon, the jury having returned to the jury box, the judge gives them such further guidance on the particular point raised as he can, and also deals with the necessity for unanimity in appropriate words. We have given very careful consideration to the passage which I have read from the summing-up of the learned judge on the necessity for unanimity. I am sorry to say we find it ill-expressed, in some respects contradictory and extremely difficult to understand. We think that the ordinary juryman, listening attentively, would also find it so and might be left with the impression that, whereas in the past judges had told juries, and told them correctly, that their verdict

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must be unanimous, the necessity for there to be unanimity of view had now been in some measure relaxed and was no longer of such importance as it used to be in the past. The jurors might also have thought that they were now entitled to regard themselves more as being in the position of committee men or members of a board of directors who, after discussing a particular point on which contradictory views were held, might eventually achieve unanimity in this fashion, namely, that a juror who held a view contrary to that held by the majority, or held a view upon which he was unable to form a concluded opinion, was entitled, as is a member of a committee or a member of a board of directors, to sink his own view without amending it or calling for a vote, and to agree with the majority of his colleagues, although he himself was still in a state of uncertainty. We need hardly add that this course is not permissible to a juror who has taken a personal oath to render a true verdict according to the evidence. There must, of course, be discussion when the jury retire to consider their verdict. A juror may retire to the jury room after a summing-up in a state of doubt, or indeed at that moment may hold a view which does not accord with what turns out to be the view of his colleagues. During the discussion his doubts may be resolved or he may be satisfied that the view which he originally held was wrong, in which case unanimity is achieved. A director or a member of a committee may continue to hold his own view, but may sink it in deference to a contrary view held by his colleagues and allow the majority decision to go through. He may also abstain from recording a vote if a vote is taken, in which case unanimity is not achieved.

We should like to refer to two cases which have been cited to us. The first is the case of MILLS (1939) 27 Cr.App.R. 80; [1939] 2 K.B. 90. That case, as was the next case to which I will refer, was a case where the jury, having deliberated for some time, returned for guidance and in that particular case the Recorder at the Central Criminal Court dealt with the question of unanimity in this fashion. He said ((1939) 27 Cr.

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App.R. at p. 81; [1939] 2 K.B. 90), repeating the words used by Finlay J. in KLEIN (1932) (unrep.): " It is of the utmost importance that a jury should come to a conclusion one way or the other at the end of a trial, because it is burdensome upon all concerned, including the accused, because it only means this, that unless you do the matter has got to be tried all over again; therefore you see the importance and necessity of coming to a conclusion one way or the other. [The Recorder went on to say that that very eminent judge had said this:] Where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others, it is quite consistent with their oaths as jurymen that they should, after hearing what the others have got to say, come to the conclusion that they themselves might be wrong, and it would be consistent with the discharge of their duty and with their oaths under those circumstances if they thought they were wrong to accept the view of the majority and come to the conclusion that the majority might be right, and in that way you come to a conclusion in which you all agree by the exchange of view, and perhaps a man in the minority might say: 'Well, I may be wrong.' That is quite consistent with the discharge of your duty."

In that case there was an appeal and it was contended that that direction by the learned Recorder was incorrect; it was incorrect in substance because it was said that he had used the words that the jury themselves " might be wrong," and although he had also used the words " if they thought they were wrong," none the less the use of the word " might " vitiated the summing-up on this particular point. The late Lord Hewart, L.C.J., having dealt first with the point that had been made on behalf of the appellant that the observations of the Recorder constituted a misdirection because he had said " I cannot release you until you have come to a conclusion," and that might amount to putting pressure on the jury, whereas, of course, he could have released them even though they disagreed, said this ((1939) 27 Cr.App.R. at p. 83; [1939] 2 K.B. at p. 92): " The real difficulty, however, does not arise with regard to that matter. The difficulty is what may have been the effect on the minds of the jury of the following words: 'Where you have got one or two, a small minority, in the jury who are thinking perhaps differently from the others,' . . ." and then he read the passage which I have read and went on to say this: "That would be correct only if the minority had been honestly and sincerely led to come to a view different from the view which they had previously entertained. The criticism which has been directed against that passage is that it may conceivably have led the jury or some members of the jury to coquette with the notion that, for the sake of mere conformity or convenience, it would be consistent with their oaths to make it appear that they accepted a view which in fact they did not accept. Such a conclusion as that would be quite subversive. A loose acquiescence by a minority in the view of the majority for the sake of conformity would not merely be most undesirable, but flagrantly wrong. It is fundamental that a jury should agree, and by 'agree' is meant honestly agree, not make a colourable appearance of agreeing." The Lord Chief Justice (Lord Hewart) then dealt with other points in that case, including the learned Recorder's final words, "I cannot release you until you have come to a conclusion," and ended up with these words ((1939) 27 Cr.App.R. at p. 85; [1939] 2 K.B. at p. 93): "There can be no doubt what the Recorder intended to convey to the jury in the present case, but he used one or two perilous phrases which may conceivably have caused some members of the jury to incline their minds to a wrong view." That is the first of the cases to which we wish to refer, because it does set out the principle which should govern the question of unanimity where that arises.

The second case is WALHEIN (1952) 36 Cr.App.R. 167. That again was a case where the learned Recorder at the Central Criminal Court was called upon to assist the jury who had returned saying they had found difficulty in arriving at a unanimous verdict, and the learned Recorder then addressed them as follows, in a passage which, I think, is well known to many of us: " You are a body of twelve men. Each of you has taken an oath to return a true verdict according to the evidence but, of course, you have a duty not only as individuals but collectively. No one must be false to that oath, but in order to return a collective verdict, the verdict of you all, there must necessarily be argument, and a certain amount of give and take and adjustment of views within the scope of the oath you have taken, and it makes for great public inconvenience and expense if jurors cannot agree owing to the unwillingness of one of their number to listen to the arguments of the rest. Having said that, I can say no more. If you disagree in your verdict in relation to one or other of these men, you must say so." In dealing with that matter the Lord Chief Justice, Lord Goddard, said this (at p. 168): " In our opinion, that was a perfectly satisfactory direction. Jurors often have to be reminded that the case may be one in which some of them may start by taking one view and then, finding that the others are against them, may talk the matter over, subordinate their views to those of the majority and concur in the verdict. That is the only way in which juries can arrive at verdicts." If the word " subordinate " means sink their own views and adopt a view which is contrary to the view they really hold in order to achieve unanimity, it seems to us that that passage from Lord Goddard's judgment runs contrary to previous decided cases, and in particular is in conflict with what was said in the case of Mills (*supra*). We do not feel that it would be proper to attribute that meaning to the word in view of the decision in Mills (*supra*) and in view of the fact that Mills (*supra*) was referred to and was distinguished in Walhein (*supra*). Therefore, we think that the words " subordinate their view " must mean come to a different conclusion after proper discussion, and not sink their views in order to achieve unanimity.

The other case to which we were referred was the case of Creasey (1953) 37 Cr.App.R. 179, which, in our view, does not really take the matter any further, and I only mention it as we were referred to it. It appears to us to support the principle laid down in MILLS (*supra*). Those are the only cases to which we would refer.

We have formed a clear view on the matter and it appears to us to be in conformity with the decided cases. If the jury are to be directed on the question of unanimity, the direction must be clear. Taking the view which we do, that the judge's direction on this point was confusing and by implication inaccurate, we think it is not only " conceivable," which was the adjective used in the case of MILLS (*supra*), but more than possible that the jury, after a very long trial, may have remembered the homely analogy in regard to members of a committee and members of a board of directors suggested to them by the judge in his summing-up, and have arrived at their verdict without a true appreciation of what their duty was as members of a jury, and may have regarded themselves more as being in the position of members of a committee or a board of directors. If they did form that view, or if they may have formed that view, that of course would entirely vitiate the whole trial.

It is not suggested here that if the first ground of appeal with which we have been dealing is entitled to succeed, that this is a case in which we could properly apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. That means that that point is sufficient to deal with this appeal, but we should like to say a word on count 1, which is dealt with specifically in the third ground of appeal. It is said that count 1 was bad in law, in that separate conspiracies were therein charged as one conspiracy. We could say a good deal on this particular point, but we are quite satisfied that count 1, as it appears in the indictment before us, is bad, in that it charges seven persons that on divers days over a period of eleven years they conspired together to cheat and defraud the creditors of a large number of companies, and bad for this reason, that some of the seven alleged conspirators had nothing to do with the affairs of some of the companies. The first two companies which are mentioned were wound up in May and November, 1958, and some of the alleged conspirators did not come into the picture until after that date. It is what one might call a "rolled-up" charge of conspiracy. It may well be that it would have been possible to allege a number of separate conspiracies between certain of the seven persons named, one of whom almost certainly would always have been Owen Morris Davey, and to refer in each of the conspiracies to the particular companies which were relevant to that conspiracy. On the other hand, it might have been possible to alter the words of the count, keeping some at any rate of the conspirators in it, if not all, and charge them with conspiring together to float companies with the object of defrauding the creditors of those companies when they were floated. But it seems to us to be quite impossible, and a bad count, to charge all the seven persons there named over a period of eleven years with conspiring to cheat and defraud the creditors of companies, some of which they had never heard of and some of which were not in existence at the time.

We need only mention the two cases of WEST AND OTHERS (1948) 32 Cr.App.R. 152; [1948] 1 K.B. 709 and DAWSON (1960) 44 Cr.App.R. 87; [1960] 1 W.L.R. 163. It seems to us that it is perfectly clear from the decisions in both those cases, and perhaps particularly in the case of DAWSON (*supra*), that a charge of conspiracy of this kind should not be "rolled up" in the fashion that this charge was. We only mention that matter, because if the conspiracy charge was bad, it may well be that it introduced evidence upon the specific charges against the appellants which otherwise would not have been admissible, and although the ground upon which we think these two appeals against conviction should be allowed is the first ground, namely, the misdirection of the learned judge on the question of unanimity, we feel the conspiracy charge is also fatal to count 1 and possibly also, if further argument had been addressed to us, might have vitiated the convictions on the other charges.

That being so, these two appeals against conviction will be allowed.

Convictions quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE ELWES

PETER TOUHEY

1960
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Rape—Alternative Verdict—Guilty of Indecent Assault—Penetration not in Dispute—Sole Issue Consent or No Consent—Indecent Assault not to be Left to Jury—Reliance by Prosecution on Conduct of Prisoner prior to Penetration—Separate Count to be Preferred.

On a charge of rape, where there is no dispute that penetration has taken place and the only issue is consent or non-consent, the alternative verdict of Guilty of indecent assault should not be left to the jury. Such a verdict may appropriately be considered by the jury in a case where the question of penetration is in issue and may be returned when the jury are not satisfied that penetration has taken place. In a case where there is no dispute that penetration has taken place, if the prosecution desire to ask for a verdict of Guilty of indecent assault based on the conduct of the prisoner preliminary to penetration, a separate count for indecent assault should be preferred.

Appeal against conviction.

The appellant was convicted at Liverpool Crown Court on June 10, 1960, of indecent assault on a girl and was sentenced by Sachs J. to eighteen months' imprisonment.

The evidence established that the appellant had invited a young girl into his car and that they had gone together into a lane where they remained for some four and a half hours. Both the complainant and the appellant agreed that penetration had ultimately taken place and the only issue was whether the girl consented. During the period preliminary to penetration the appellant (as he himself admitted) had handled the girl indecently without her consent. There was no separate count for indecent assault in the indictment. After a short retirement the jury returned into court and asked whether it was open to them to return a verdict of Guilty of indecent assault. The judge directed them that that verdict was open to them, but that, before they returned it, they must be satisfied that all that had happened in the four and a half hours was, in effect, one incident and not a series of incidents. Without further retirement the jury then returned a verdict of Guilty of indecent assault.

J. Jaffe for the appellant. The judge failed to direct the jury adequately on burden of proof and on the question of corroboration. Further, the verdict cannot be regarded as satisfactory having regard to the evidence. The issue was one of consent or non-consent to penetration, which both the complainant and the appellant agreed had taken place, and the jury should, therefore, either have returned a verdict of Guilty of rape or a verdict of Not Guilty. The verdict which they did return savours of a compromise.

G. J. Bean for the Crown. The judge gave the jury a careful warning of the manner in which they should regard the evidence if they convicted of indecent assault, and it must be assumed that they had that warning in mind when they returned a verdict which was clearly open to them in law.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Crown Court at Liverpool of indecent assault and sentenced to eighteen months' imprisonment. He now appeals on a point of law against conviction.

He was indicted for rape. All that need be stated on the facts is that the appellant invited a young girl into his car and they went into a lane. He started trying to kiss her and thereafter he handled her indecently and throughout that period, on his own statement, he was using force and acting without the girl's consent. At the end of some four and a half hours he had intercourse with her, and the question was whether the jury were satisfied that she had not consented. It appears that, unfortunately, the jury had been in court when a previous case of rape had been tried and there the alternative verdict of

Guilty of indecent assault had been returned. After the jury in this case had been out for some eighteen minutes, they came back and asked the learned judge whether they could bring in an alternative verdict of Guilty of indecent assault. It was clear from that question, in our opinion, that the jury were not satisfied that the girl did not consent in the end, that is to say, when penetration took place, but that they were satisfied that she had not consented to the conduct which had taken place in the preceding hours, which clearly amounted, if she did not consent, to indecent assault. Up to that point nobody, counsel or judge, had considered or thought of the idea of a conviction of indecent assault. Faced with that question, the learned judge, in effect, told them that they could return that verdict, but that, before they did so, they must be satisfied that all that had happened during those four and a half hours was, in effect, one incident and not a series of incidents. The jury, having that consideration fully in mind, without retiring again, returned a verdict of Guilty of indecent assault.

Mr. Jaffe, on behalf of the appellant, has taken a number of points with regard to alleged non-direction, on the need for the prosecution to negative consent, and on alleged misdirection in regard to corroboration. It is only right to say that the court can see nothing in those points at all. It seems to us that the learned judge gave a perfectly good direction on the onus of proof and also on the facts of this case in regard to corroboration. The only point, and an interesting point, is whether the learned judge was right to leave the issue of indecent assault to the jury at all. The court has come to the conclusion that on the facts of this case such an alternative verdict should not have been left to them. I say " on the facts of this case," because this was a case where it was admitted both by the complainant and by the appellant that penetration had taken place, and the sole issue was consent or no consent. There was no other charge whatsoever. It is quite clear that indecent assault is referred to and is often dealt with as an alternative to rape, but that applies in a case where the issue is not consent or no consent. Indecent assault is an alternative verdict which the jury may return when they are not satisfied that penetration took place. Here penetration was admitted on both sides. On those facts it seems to this court that, if the prosecution desired to show that in the preliminaries leading up to penetration there was an indecent assault without the girl's consent, they should have laid a separate charge to that effect.

Regretfully the court has come to the conclusion that this conviction must be quashed.

Conviction quashed.

Solicitor: The Town Clerk, Southport, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE ELWES

1960
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FREDERICK SEIGA

Summing-up — Receiving — Joint Possession with Thief Alleged — Constructive Possession—Necessity for Careful Direction.

Though in certain cases a person having joint possession with a thief may be convicted of receiving, where the question arises whether at some stage subsequent to the theft the prisoner has come into possession of the goods either jointly or on his own, a particularly careful direction on this matter is required. In the present case, as there had been an insufficient direction on this matter and on the meaning of constructive possession, the conviction must be quashed.

WILEY (1850) 2 Den. 37 and BERGER (1915) 11 Cr.App.R. 72 followed.

Appeal against conviction.

The appellant was convicted at Lancashire Quarter Sessions on June 1, 1960, of receiving stolen goods and was sentenced by the Deputy-Chairman to two years' imprisonment.

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Parker L.C.J., Ashworth J., Elwes J.

The appellant and one Atherton were indicted for shopbreaking and larceny and, alternatively, for receiving stolen goods. Atherton pleaded Guilty to the first count. The appellant pleaded Not Guilty to both counts, and was acquitted on the first but convicted on the second.

The premises named in the indictment, a grocer's shop, were broken into in the early hours of March 14, 1960. At 5.30 a.m. the appellant and Atherton were found by a police officer in an unlighted van. The police officer removed the ignition key and went for assistance and on his return some five minutes later found that the appellant and Atherton had disappeared. In the back of the van was a quantity of property stolen from the shop and in the front a bottle of orangeade which bore the appellant's fingerprints. The appellant, in his evidence, said that he had gone into the van as a result of an offer by Atherton to give him a lift back to Liverpool and that he knew nothing about the stolen property in the van. The material portions of the summing-up appear in the judgment.

P. J. Briggs for the appellant. The acquittal of the appellant on the first count means that the jury were not satisfied that he came into possession of the stolen property at the time of the theft. He could, therefore, be convicted of receiving only if at some later stage he came into possession of the stolen property either alone or jointly with Atherton. This was a matter which required a very careful direction and the summing-up on this matter was inadequate. Reference was made to the possibility of the appellant being in constructive possession of the property, but it was not explained to the jury what was meant by constructive possession nor were the jury invited to consider how or when the appellant could have come into possession of the goods subsequently to the theft.

A. S. Booth for the Crown. A person having possession of stolen property jointly with the thief may be convicted as a receiver: WILEY (1850) 2 Den. 37; BERGER (1915) 11 Cr.App. R. 72. To render him liable as a receiver the goods must be under his control, and though the summing-up was not very

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full on this aspect of the case, this is substantially what the Deputy-Chairman told the jury. If the court should be of opinion that the summing-up was inadequate, it is submitted that this is a case where the proviso to section 4 (1) of the Criminal Appeal Act, 1907, might properly be applied.

ASHWORTH J.: This appellant was charged at Lancashire Quarter Sessions on June 1, 1960, together with one Atherton on an indictment containing, *inter alia*, counts charging them both with breaking and entering a grocer's shop and stealing a quantity of groceries, and further charging the appellant alone with receiving those groceries knowing them to have been stolen. Atherton pleaded Guilty to the first of these two counts, but the appellant pleaded Not Guilty to both. The jury acquitted him of breaking and entering, but convicted him of receiving, and he has now by leave of this court appealed against that conviction. The case is not an easy one, and the court is indebted to counsel on both sides for their careful arguments.

The grocer's shop was broken into in the early hours of March 14, 1960, and at 5.30 a.m. the appellant and Atherton were found by a police officer asleep in a van with no lights on. He went for assistance, having succeeded in removing the ignition key of the van, and on his return some five minutes later found that the two occupants had disappeared. In the back of the van were the groceries stolen from the shop, and in the front there was a bottle of orangeade on which there proved to be the appellant's finger-prints. The appellant, in evidence, gave an account of his movements during the night in question, and he explained his presence in the van as being the result of an offer by Atherton to give him a lift back to Liverpool. The story which he told was far from convincing, and it seems clear that the jury did not believe it.

The difficulty in the case arises out of the learned Deputy-Chairman's direction on receiving. As he rightly told the jury, this issue required consideration only if they were not satisfied of the appellant's guilt on the charge of breaking and entering.

Before the jury could convict him of receiving, they would have to be satisfied that he was in possession either personally or jointly with Atherton of the stolen goods, and the jury were rightly so directed. But the question whether he was in such possession was a matter which, in the circumstances of this case, called for careful direction. His acquittal on the first count involved the consequence that he did not obtain possession at the time of the theft, and an important question for the jury was whether at some later stage he came into possession of the goods jointly with Atherton or possibly on his own.

In the course of his summing-up the learned Deputy-Chairman said: " Again, you may think, it has been proved beyond any doubt that at any rate the bottle of orange squash was in the possession of the accused, because it has been proved that his finger marks were on the bottle. What you will have to decide, members of the jury, is really this: Have the prosecution satisfied you that the prisoner was with Atherton in this enterprise of breaking and entering? and if you are not satisfied about that, then you will have to consider whether the prosecution have established that the accused at any rate received that bottle of orange squash, and that he received it knowing it to have been stolen. There has been the suggestion that he was in constructive possession of all the rest of the stuff in the van in that he was there sitting in the passenger seat. That is a matter for you to consider, members of the jury, whether they have established that, and whether they have established that the accused knew it was stolen." On more than one occasion thereafter he reminded the jury that, before they could convict the appellant of receiving, they must be satisfied that he was in possession of the stolen goods, but he did not explain what is meant by constructive possession, nor did he invite them to consider when or how the appellant came into possession of the goods either jointly or alone.

In paragraph 2092 of the 34th edition of *Archbold*, it is stated: " Even if there is proof of a criminal intent to receive and a knowledge that the goods were stolen, if the exclusive possession still remains in the thief, a conviction for receiving

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cannot be sustained." Various authorities are cited in support of this statement, including WILEY (1850) 2 Den. 37 and BERGER (1915) 11 Cr.App.R. 72. In the latter case, at p. 74, the Lord Chief Justice quoted with approval a passage from the judgment of Patteson J. in WILEY'S case in the following terms: "'I do not think it necessary that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the thieves may not be convicted as a receiver; but, I think, to make a person liable as a receiver the goods must be under his control.' That states the law accurately and in language which would be understood by the ordinary person who is not familiar with legal matters."

In the judgment of this court, the summing-up in this case did not sufficiently deal with the issues whether the stolen goods were in the appellant's possession jointly with Atherton or, on the other hand, whether they were at all material times in the exclusive possession of Atherton. At the same time there was undoubtedly enough evidence to justify conviction if the direction to the jury had been fuller, and this judgment is not to be taken as casting any doubt on the proposition that, if the evidence is sufficient, a person having joint possession with a thief may be convicted of receiving.

For these reasons this court is constrained to allow the appeal, and the conviction will be quashed.

Conviction quashed.

Solicitors: Steels, of Warrington, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE ELWES

ANTHONY FRANCIS GIOVANNONE

1960
Oct. 25

False Pretences — Evidence of Similar Acts — Issue of Identity — Evidence Held Admissible.

The appellant, with one C., went to one S., who had a car for sale. Negotiations took place and an inspection of the car was carried out by a person purporting to be a fitter, whom the prosecution alleged was the appellant. Eventually C. expressed himself satisfied with the car and handed over a cheque, which was subsequently dishonoured, in payment to S. At the trial S. identified the appellant as the fitter, but the appellant denied that he was the man concerned. By leave of the court, the prosecution called witnesses who deposed to three similar incidents and who identified the appellant as the fitter concerned in each case.

Held, that, though evidence relating to similar incidents was not admissible for the purpose of showing a tendency or predisposition to commit the offence charged, it was admissible to prove identity, and as identity was a matter very definitely in issue in the present case, the evidence had been properly admitted.

ROBINSON (1953) 37 Cr.App.R. 95 and HARRIS (1952) 36 Cr.App.R. 53; [1952] A.C. 594 followed.

Appeal against conviction.

The appellant was convicted at Reading Quarter Sessions on July 21, 1960, of obtaining a motor-car by false pretences, and was sentenced by the Recorder (R. C. Hutton, Esq.) to two months' imprisonment.

The facts are summarised in the headnote.

R. H. Tulk for the appellant. The summing-up was in some respects unsatisfactory, as was the evidence of identification. Further, the evidence of other alleged similar offences by the

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appellant was highly prejudicial and should not have been admitted.

R. M. Talbot for the Crown. The evidence of similar offences was admissible to prove identity, which was here directly in issue: ROBINSON (1953) 37 Cr.App.R. 95 and HARRIS (1952) 36 Cr.App.R. 53; [1952] A.C. 594. The identification by Seward was very strong indeed.

ASHWORTH J. This appellant was convicted at Reading Quarter Sessions, before the Recorder, of obtaining a car by false pretences and was sentenced to two months' imprisonment. He now appeals by leave of this court.

The offence was committed in company with a man named Card, and the system adopted was simple and to the following effect. Card and the appellant went to a man called Seward, who had a car for sale. Negotiations took place, and an inspection of the car was carried out by a person who purported to be a fitter. There was some conversation on the merits of the car. In the end Card expressed himself satisfied with the condition of the car, handed over a cheque for the price, and drove the car away. The cheque was dishonoured. At the identification parade Seward was quite positive that the appellant was the fitter and said so in the course of his evidence.

There are four grounds of appeal, of which only one can be said to have any substance. The second and third consist of criticism of the way in which the Recorder summed up to the jury, and it is sufficient for me to say that, in our view, these criticisms, if not actually unworthy, were entirely unjustified. The fourth ground deals with the question of identification, and it is enough to say on that, as we were reminded by counsel for the Crown, that Seward, the victim, identified the appellant as the fitter no less than three times in the course of his evidence.

The ground which is of more substance arises in this way. The prosecution proposed to tender the evidence of witnesses who had been subjected to incidents similar to the one dealt with at Reading, and those witnesses were in a position to say

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that the method adopted of obtaining a car by false pretences was in all essentials precisely the same as at Reading. There was the same conversation, the same inspection, the same so-called discussion with the fitter, and the like, and those witnesses were in a position to say that on each occasion the fitter was the appellant. Objection was taken to the admissibility of that evidence, but the Recorder ruled that it was admissible.

This question of the admissibility of evidence relating to other incidents is one that has come before the court on a number of occasions. I do not, for my part, think it necessary to refer to all the authorities which have been cited to us. The important thing, in my judgment, is to realise that evidence of that sort is not admissible for the purpose of showing a tendency or predisposition to commit the offence charged. In the present case it was admissible to prove identity, which was a matter very definitely in issue. Seward had positively identified the appellant as being the fitter on the occasion at Reading. I propose to quote a passage from the judgment of this court in ROBINSON (1953) 37 Cr.App.R. 95, where this was said (at p. 108): " . . . the issue and the only issue, was one of identification. It is by no means new law that, whilst evidence of other offences can never be adduced for the purpose merely of showing that a man is of criminal disposition and, as such, likely to commit a particular offence, one of the objects for which in a proper case evidence of other occurrences can be given is for the purpose of establishing identification. In HARRIS (1952) 36 Cr.App.R. 53; [1952] A.C. 594 that is expressly recognised. There are, of course, other objects in other cases—negativing accident, proving *mens rea*, negativing mistake. In HARRIS ((1952) 36 Cr.App.R. at p. 55; [1952] A.C. at p. 708) Lord Simon expressly mentions one of the circumstances where such evidence may be admitted as occurring in a case where identity has to be proved," and there follows a quotation from Lord Simon's speech in that case.

In the present case the similarities of the course of conduct on the three other occasions to the course of conduct pursued

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at Reading were marked. The identification on the three other occasions was positive, and indeed not in issue, and it seems to us that the admissibility of that evidence with regard to the offence at Reading was plainly established, since it served to show that the evidence given by Seward that the fitter was the appellant was indeed right.

For these reasons this appeal fails.

Appeal dismissed.

Solicitors: Arthur S. Clark & Son, Reading, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH AND MR. JUSTICE ELWES

1960
Nov. 8

JAMES WHITE

Verdict—Ambiguity—Refusal by Trial Judge to Accept—Questions on Meaning of Verdict and Further Direction on Law.

Refusal by the trial judge to accept an ambiguous verdict, and questions on the meaning of the verdict and further direction in law, approved by the court as being a proper practice.

Application for leave to appeal against conviction.

The applicant was convicted at West Ham Quarter Sessions on January 7, 1960, of receiving stolen property and was sentenced by the Recorder (W. A. L. Raeburn, Esq., Q.C.) to three years' imprisonment.

The applicant was convicted together with a co-prisoner and when the jury returned their verdict the foreman said: " We would like to put in a plea for leniency," and when asked the reason added: " When they started selling projectors they may have been doing it quite innocently, but as time went on

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it may have dawned on them. We put it down to simple-mindedness." The Recorder refused to accept the verdict and again explained the law to the jury. The jury were asked once more their verdict in respect of each count, and returned a verdict of Guilty on all counts.

No counsel appeared.

THE LORD CHIEF JUSTICE: This applicant, together with a man called Standley, was convicted at West Ham Quarter Sessions on six counts of receiving stolen property and was sentenced by the Recorder to three years' imprisonment. He has now applied, some six months out of time, for leave to appeal against conviction, his application having already been refused by the single judge. However, the court has thought it right to obtain a transcript, notwithstanding that he is six months out of time, because he raises a point about the verdict of the jury.

A man called Harley was in charge of a store containing property belonging to the Sea Scouts Cadet Corps, West Ham, and that property, which was stolen and disposed of by Harley, came into the possession of the applicant. The question was whether, when it came into his possession, he knew that it had been stolen. When the verdict was taken from the jury, they were taken through the six counts, and the foreman suddenly said: "We would also like to put in a plea for leniency." The Recorder said: "I do not think you need have any worry about that in this court," and later he said: "Regarding the recommendation to mercy, you do not know about their characters. Have the jury indicated any reason at all?" Then the foreman said: "Yes, sir. When they started selling projectors, they may have been doing it quite innocently, but as time went on it may have dawned on them. We put it down to simple-mindedness." Taking that at its face value, the jury were really saying: "We were not satisfied that in the early stages the prisoners knew that this property was stolen property, but it dawned on them later on." Faced with that, the Recorder quite properly refused to accept the verdict that the jury had given, and after he had explained the law to them again they were asked once more in respect of each count what was their verdict. On the second occasion there was no ambiguity and they returned a verdict of Guilty on all counts.

It seems to this court that the Recorder was acting entirely within his rights in doing what he did and that in the end there was no ambiguity. Accordingly, this application is refused.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE
AND MR. JUSTICE ELWES

1960
Nov. 14

PETER MICHAEL COOMBES

Evidence — Similar Offence — No Evidence Led by Prosecution — Matter Introduced in Cross-examination—Prejudicial Effect—Proviso not Applied.

The appellant, who was charged with indecent assault on a married woman, put forward the defence of accident and absence of guilty intent. He admitted, in answer to a question put to him in cross-examination, that some months previously he had pleaded Guilty to indecent assault on a girl aged twelve. No evidence with regard to the earlier offence had been led by the prosecution, nor had the details of it been given in evidence before the cross-examination was admitted.

Held, that, though evidence of a previous similar offence is admissible to rebut a defence of accident or absence of guilty intent, in order to render evidence of the earlier offence admissible there must be some nexus with the offence charged both in time and in the nature of the offence; and (without deciding whether the earlier offence in the present case came within that rule) the evidence, in view of its highly prejudicial nature, ought not to have been admitted, and that the court would decline to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and would quash the conviction.

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Appeal against conviction.

The appellant was convicted at the Isle of Wight Quarter Sessions on June 9, 1960, of indecent assault on a married woman and was sentenced by the Chairman (Norman Skelhorn, Esq., Q.C.) to Borstal training.

The appellant's defence was that of accident and absence of guilty intent. After permission had been obtained from the Chairman, counsel for the prosecution asked the appellant in cross-examination whether a few months previously he had pleaded Guilty to indecent assault on a girl aged twelve and the appellant admitted that he had done so. No evidence with regard to this earlier offence had been led by the prosecution, nor were the details of it told to the Chairman before the evidence of it was admitted.

J. R. Main for the appellant. The cross-examination of the appellant with regard to the earlier offence should not have been admitted. It was an offence under the same section of the statute, but not strictly a similar offence, as the age of the victim and the circumstances were entirely different from those of the offence charged. Further, even if the evidence was in strict law admissible, in view of its highly prejudicial nature the Chairman should, in the exercise of his discretion, have excluded it.

Raymond Stock for the Crown. Both the earlier offence and the offence charged involved indecent assault on a female, and were, therefore, sufficiently similar to render evidence of the earlier offence admissible to rebut a defence of accident or absence of guilty intent. It was entirely a matter for the Chairman's discretion whether to admit the evidence of the earlier offence or not and it is not the practice of this court to interfere with the exercise of discretion by the trial judge. Even if there was an irregularity in admitting the question put to the appellant in cross-examination, the evidence of guilt was so clear and cogent that the court might think it proper to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

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THE LORD CHIEF JUSTICE: The appellant was convicted at the Isle of Wight Quarter Sessions of indecent assault and sentenced to Borstal training. He now appeals against conviction by leave of the court, the question being whether cross-examination with regard to a previous incident of indecent assault was properly allowed.

What happened was that in May 1960 a married woman was walking home along a street and the appellant, who was pushing a hand cart, left it and followed her for some distance. According to her, he caught up with her and asked her the time and then touched her lightly on the back and said: "Are you going to give me a bit?" She was frightened and complained at once to a householder.

His defence, when he was questioned by the police, was that what had happened was an accident. He said: "I tripped and fell against her. I did want to touch her, but I was trying to stop myself. I did it by accident more or less." Then in a statement he said: "I did it, but I didn't mean to do it. I wanted to touch her and I was swinging my arms about to make it look accidental. I went too near and touched her, then I touched her on the private person on the backside. I tried to stop myself, but I walked past too near and touched her. . . . I said 'I'm sorry, I didn't mean it a bit.' . . . I stopped myself. It was only an accident, come to look at it." Accordingly, his case was that he touched her by accident and had no guilty intent.

It appears that the appellant had, in January 1960, pleaded guilty to an indecent assault on a girl of twelve and had been convicted of a similar offence against another girl of twelve. In the course of the present trial the jury were asked to retire. Counsel for the prosecution then submitted that he was entitled to ask the appellant whether he had pleaded guilty to indecent assault on a girl of twelve. The Chairman ruled that it would be admissible. The jury returned. The appellant was asked and he admitted the matter.

It is perfectly clear that evidence of a previous offence is admissible to rebut a defence of accident and also to rebut a defence of innocent intent; but the offence which it is sought to adduce in evidence must be of a similar character. There is no clear authority as to how similar the offence must be to make it admissible; but there must be some nexus both in time and in the nature of the offence. In the present case the Chairman was not told in detail what the offence was, except that it involved a young girl.

It is unnecessary to say whether the offence in January was similar enough in nature to the offence with which the appellant was later charged to make evidence of the earlier offence admissible, because such evidence was of a very highly prejudicial character and its prejudicial effect far exceeded its probative value. Whether a judge or chairman admits such evidence, assuming that it is admissible, is a matter of discretion and the court would not lightly interfere with his discretion, but, so far as the present case is concerned, the Chairman had not got the details before him when he ruled. One can perhaps test the matter in this way: if the prosecution had called the police officer and if he had given detailed evidence of the nature of the previous offence, would not any chairman have said: "This is just the sort of evidence which will inflame the jury, where the prejudicial value would far exceed the probative value," and on that ground excluded it? The Chairman did not have that evidence before him when he ruled. In these circumstances the court feels that it is possible to interfere with the Chairman's discretion and hold that the evidence ought not to have been admitted. The court is all the more ready to do this in this case because no evidence had been led by the prosecution on the matter, which had arisen only in cross-examination. If defending counsel were to bring out the true facts of the earlier case to show how different they were from the facts of the case under consideration, he would only inflame the jury the more, because the offences with the little girls were horrible offences. On that ground alone the introduction of this matter in cross-examination was most highly prejudicial to the appellant.

The court has considered whether this is a case where the

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proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied. It follows from what I have said that this is not the sort of case where the proviso could be applied. If, as we hold, this evidence was likely to inflame the jury, it is quite impossible to say that without it they must have come to the same conclusion. In those circumstances the court feels that it is unsafe to let this conviction stand and it must be quashed.

Conviction quashed.

Solicitors: Roach, Pitts, Newport, Isle of Wight, for the appellant; Bailey & Band, Newport, Isle of Wight, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE ELWES

1960
Nov. 14

FRANK REGINALD NURSE

Sentence — Preventive Detention — Consecutive Sentence of Imprisonment.

A sentence of imprisonment to run consecutively to a sentence of preventive detention may properly be passed.

TALBOT (1953) 37 Cr.App.R. 23 and HEDGECOCK (1957) 41 Cr.App.R. 136 distinguished.

Appeal against sentence.

The appellant pleaded guilty at Bristol Assizes on February 25, 1959, to wounding with intent and was sentenced by Slade J. to two years' imprisonment and a supervision order under section 22 of the Criminal Justice Act, 1948, the sentence

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to begin at the conclusion of a sentence of seven years' preventive detention then being served.

The offence was committed when, after being allowed to reside in a preventive detention hostel and go out to work, the appellant became involved in a public-house brawl and attacked another man with a glass.

M. Fallon for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant pleaded guilty at Bristol Assizes to wounding with intent and was sentenced to two years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948, the sentence to begin at the conclusion of a sentence of preventive detention then being served by him. He now appeals against that sentence by leave of the single judge, who gave leave in order that the court should consider the question of the propriety of imposing the sentence of imprisonment consecutive to the sentence of preventive detention.

The appellant is a man of thirty-eight years of age with thirteen previous convictions, the last conviction being in 1954, when he received seven years' preventive detention for eight cases of housebreaking. Apparently he had been allowed out to work at a preventive detention hostel in Bristol. One night he became involved in a public-house brawl and attacked another man with a glass in his hand, inflicting cuts on him.

The matter came before the court first on October 17, when the court adjourned the case in order to make inquiries whether a sentence of imprisonment following a sentence of preventive detention raised any administrative difficulties. We did that bearing in mind that in the case of corrective training this court has said in TALBOT (1953) 37 Cr.App.R. 23 and HEDGECOCK (1957) 41 Cr.App.R. 136 that a sentence of imprisonment following corrective training is inappropriate. The court has made inquiries and understands that the sentence in this case would raise no administrative difficulties. The court feels that

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there is nothing wrong in principle in such a sentence; it was fully deserved and, accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitor: The Prosecuting Solicitor, City and County of Bristol, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD, MR. JUSTICE GLYN-JONES, MR. JUSTICE ASHWORTH AND MR. JUSTICE ELWES

1960
Dec. 2

STEPHEN WILLIAM AMOS

Sentence — Borstal Training — Committal to Quarter Sessions for Sentence — Twelve Months' Maximum Sentence of Imprisonment for Offence—Power of Quarter Sessions to Pass Sentence of Borstal Training — Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 20 (5).

The appellant pleaded guilty at a magistrates' court to two offences of obtaining credit by fraud, the maximum sentence for any such offence being twelve months' imprisonment. He was committed to quarter sessions for sentence under section 28 of the Magistrates' Courts Act, 1952, and quarter sessions imposed a sentence of Borstal training.

Held, that though the effect of such a sentence would probably be to deprive the appellant of his liberty for a longer period than the maximum prison sentence, this fact did not deprive quarter sessions of the power to impose a sentence of Borstal training. The maximum prison sentence fixed by statute was a relevant consideration, but no more; and in the circumstances of the case the sentence of Borstal training must be regarded as appropriate.

JAMES [1960] 1 W.L.R. 812 and LONGSTREETH (1952) (unreported) not followed.

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Appeal against sentence.

The appellant pleaded guilty at Reading Magistrates' Court to two charges of obtaining credit by fraud and was committed to Reading Quarter Sessions for sentence, under section 28 of the Magistrates' Courts Act, 1952. The offences were committed during a period of three years' probation, the probation order having been made on April 6, 1960, following on a conviction of shopbreaking and larceny. On July 21, 1960, the Recorder (Robert Hutton, Esq.) passed a sentence of Borstal training in respect of the offences for which the appellant had been committed for sentence and a concurrent sentence in respect of the breach of the probation order for the offence of shopbreaking and larceny.

Jane Griffiths for the appellant. The decision of this court in JAMES [1960] 1 W.L.R. 812, following on the decision in LONGSTREETH (1952) (unreported), was to the effect that it is wrong to impose a sentence of Borstal training in a case such as the present, where such a sentence would in all probability have the effect of depriving the prisoner of his liability for a longer period than the maximum prison sentence. Further, the probation officer was anxious to continue supervision of the appellant for a longer period and emphasised that his lack of a home and the circumstances of his upbringing had been a substantial cause of his offences.

R. M. A. C. Talbot for the Crown. If the previous decisions of this court went so far as to decide that a sentence of Borstal training is wrong in principle in a case such as the present, they must be regarded as having been decided *per incuriam.* It is to be observed that there was no argument addressed to the court in either case. In the present case the Recorder rightly took the view that the appellant was the ringleader, and obviously considered that in all the circumstances Borstal training was the appropriate sentence, and such a sentence cannot be considered wrong in principle.

THE LORD CHIEF JUSTICE: The appellant and a young man named Gibson pleaded guilty to obtaining £20 5s. 0d. by fraud.

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The appellant was also found guilty of a similar offence involving £26. They were committed to Reading Borough Quarter Sessions for sentence and the Recorder sentenced the appellant to Borstal training and made a concurrent order for Borstal training in respect of a shopbreaking offence for which he had been put on probation. He now appeals to this court against his sentence by leave of the single judge.

So far as the offences are concerned, the first was committed on July 25 when he went to a shop and obtained a cycle on a credit sale. He stated that he was twenty-one years old, whereas he was only nineteen, and he gave a false name and address. He paid a deposit and owed a total of some £31 16s. 0d. On the evening of the same day he went with Gibson to another shop; they selected another cycle and about the same time on the next evening they returned to the shop together and Gibson produced a rent book. He gave a false name and the rent book was in fact a false document. It is said that when questioned by the police the appellant said: " A simple little fiddle and the law is on to you for it," and again, " I'd like to get hold of the bastard who put the whisper in."

As I have said, the appellant is nineteen years old. He was convicted on March 7, 1960, of stealing cigarettes and money from a machine and was fined £20. Just about a month later he was convicted of shopbreaking and larceny which in fact had been committed before the offence of stealing the cigarettes, when he was put on probation for three years, another offence being taken into consideration. The present offences were committed three and a half months after he was put on probation. The Prison Commissioners reported that he was suitable for Borstal training. The Probation Officer felt that he had in fact only had this young man under him for three and a half months and was anxious to continue in order to see what he could do in his interests. He pointed out that he had no home and that his upbringing had been the cause of his instability, immaturity and irresponsibility. Miss Griffiths, who has said everything on his behalf, tells us that during the adjournment the Probation Officer saw the appellant's brother, who said he was prepared to make a home for him. The Recorder, on the other hand, took the view, and the Probation Officer was forced to agree, that this young man was the ringleader. The Recorder also took the view that when a man was guilty of further offences of this sort within three and a half months of being put on probation, at which time no doubt he was warned as to the results of committing further offences, he had to be punished, and imposed a sentence of Borstal training. The court has come to the conclusion that on the merits, if I may put it in that way, there is no reason whatsoever to interfere with that sentence.

Leave to appeal was given by the single judge, in fact myself, having regard to the fact that at the end of the case Miss Griffiths quite properly drew the attention of the Recorder to a recent decision of this court. In fact it was the case of JAMES [1960] 1 W.L.R. 812, although she did not refer to it by name, in which the court used words which might have conveyed that where the maximum sentence fixed by statute is less than the period for which an offender would be detained in Borstal, then Borstal was an inappropriate sentence. Accordingly, the maximum sentence for obtaining credit by fraud being twelve months, it might be said that the concurrent sentence of Borstal training in respect of the offences of obtaining credit by fraud was inappropriate.

As long ago as June 23, 1952, the case of LONGSTREETH (unreported) came before this court. In fact no counsel appeared in the case, and the case remained unreported, but Lord Goddard drew attention to the fact that the offence in question there was an offence against section 4 of the Vagrancy Act, 1824, under which the maximum sentence was three months. He said this: " That means that if he goes to Borstal he will probably be detained fifteen months, and that is what causes the court to wonder whether Borstal training ought to be imposed on these youths when the maximum sentence they can receive is only one of three months. I dare say it would be very much better that they should go somewhere to be

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trained, but on the whole we do not think it is a satisfactory sentence because it does deprive him of his liberty. If he is sentenced to imprisonment he cannot be deprived of his liberty for more than three months, and if he behaves himself that is two months. That is the position, and the court thinks that on the whole they ought to set aside the sentence of Borstal training."

In the case of JAMES (*supra*), which came before this court on June 20, 1960, again no counsel were present, and the court, anxious to follow the decision in LONGSTREETH (*supra*), of which they had a transcript, set aside a sentence of Borstal training in respect again of an offence against the Vagrancy Act. The court in JAMES (*supra*) referred to LONGSTREETH (*supra*), and said this: " In a probation officer's report which this court has called for it is clear that the probation officer does not think she has reached that stage of stability where she can be relied upon not to go to coloured cafés. Accordingly, it is just the sort of case where this girl would benefit from Borstal training. Nevertheless, this court has, as I have indicated, said that in these circumstances Borstal training is the wrong sentence."

In so far as those two decisions imply that where the maximum sentence fixed by statute is less than the period for which a prisoner would undergo Borstal training then Borstal training is wholly inapplicable, that is clearly wrong. No doubt the maximum sentence fixed by statute is a relevant consideration, but it is no more than that; indeed, were it otherwise a severe limitation would be imposed on the powers of justices to commit to quarter sessions under section 28 of the Magistrates' Courts Act, 1952, and, indeed, on the powers of the court under section 20 of the Criminal Justice Act, 1948.

Unfortunately the decision in JAMES (*supra*) has been reported, and the court feels that some public statement is necessary to dispel the doubts which have arisen. Having been myself a member of the court in both cases, it is only right that I should say that the court had no intention of limiting the powers in the way in which it is said they have done; indeed, the sections are perfectly clear and the court could not

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limit their operation. I have consulted Hilbery and Diplock JJ., who were members of the court which decided the case of JAMES (*supra*), and they have asked me to say that what is now being said has their full approval. This court as at present constituted thinks it is clear that those cases went too far in so far as they suggested that Borstal training cannot be imposed in such circumstances. Accordingly, the Recorder in the present case was free to impose a sentence of Borstal training and, for the reasons stated earlier, we think it was the right sentence. Accordingly, this appeal is dismissed.

Appeal dismissed.

Solicitors: Boyes, Turner & Burrows, Reading, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD AND MR. JUSTICE ASHWORTH

JUDY CASLIN

1960
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Larceny by a Trick — False Pretences — Distinction Between the Two Offences — Money Paid to Club Hostess for Intended Services as Prostitute — Intention to Pass Property as well as Possession in Money Paid—Conviction of Larceny—Power to Substitute Verdict of Guilty of False Pretences — Case of False Pretences Not Left to Jury — Test to be Applied in Substitution of Verdict—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

The appellant, a club hostess, invited an American sergeant into certain premises, and (as the Court of Criminal Appeal held was to be inferred from the facts proved in the case) at the entrance represented to him that she was a prostitute, that she was ready and willing there and then to prostitute her body for money, and that she had a bedroom on the premises available for that purpose. At various stages after he had

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entered the premises the sergeant handed sums of £1, £3, and £1 10s. respectively either to the appellant herself or to a barmaid on her behalf. After informing the sergeant that the bedroom was temporarily occupied and that she would meet him outside later, the appellant disappeared and no intercourse took place between her and the sergeant. When the police arrived, they found that the door which the appellant had indicated as leading to the occupied bedroom did not lead to a bedroom at all. The appellant was convicted of larceny of the three sums. The judge did not give the jury any direction on the possible alternative verdict in each case of obtaining the property by false pretences.

Held, (i) that the conviction was wrong, since the conduct of the appellant did not amount to larceny by a trick, inasmuch as the sergeant intended to pass to the appellant not merely the possession, but also the property, in each sum of money; (ii) that, in considering whether the court should exercise its powers under section 5 (2) of the Criminal Appeal Act, 1907, and substitute verdicts of Guilty of obtaining the sums by false pretences, the test to be applied was not whether the judge had in fact directed the jury on the alternative verdict, but whether the jury must have been satisfied of facts which proved the appellant guilty of the other offence; (iii) that in the present case the jury must have been satisfied of facts which proved the appellant guilty of obtaining the sums by false pretences and that the court would, therefore, exercise its powers under section 5 (2) of substituting verdicts of obtaining the respective sums by false pretences.

Appeal against conviction and sentence.

The appellant was convicted at the County of London Sessions on August 17, 1960, on three counts of larceny (by a trick) and was sentenced by the Chairman (R. E. Seaton, Esq.) to three consecutive terms of six months' imprisonment.

At about 10 p.m. on August 3, 1960, an American sergeant was walking through the West End of London looking for pleasure. He came to a near-beer club in Soho and saw the appellant in the doorway. She asked if he was looking for a girl and invited him to have a good time. He asked how much, and she said £2 10s. She invited him to go into the doorway and then asked him for 10s. for key money for a bedroom. He gave her £1. They went down some steps, she opened a door, and they went into the basement, where the business of the

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" club " was carried on, and sat down at a table. The appellant put the £1 he had given her on the table and drinks were brought by a barmaid, who took the £1. Several more drinks were brought for which the sergeant paid the barmaid. The sergeant never expected to get his £1 back. In due course the appellant asked him for the £2 10s. He gave her £3. She did not pick it up from the table, but asked the barmaid to keep it for her. The barmaid took the money away. There was no evidence that the money ever came into the appellant's possession. Later they left the club. The appellant asked the sergeant for 30s. for a room and he gave it to her, but when they went upstairs and came to a door with a Yale lock she said something about the room being occupied. She arranged to meet him ten minutes later at the corner of a street, but she never turned up and he went to the police. Police officers gave evidence that later they examined the door with the Yale lock and there was no bedroom there at all.

W. R. Rees-Davies for the appellant. The real issue in this case is whether, on the facts and apart from the summing-up, the case was one of larceny by trick, or obtaining property by false pretences, or neither of these offences. In the submission of the appellant no offence at all was disclosed. Further, the summing-up on this question was entirely unsatisfactory and so defective that the court should not consider the question of applying the proviso to section 4 (1) of the Criminal Appeal Act, 1907. It is further submitted that, even if the court has power under section 5 (2) of the Act in certain circumstances to substitute a verdict of Guilty of false pretences for a verdict of Guilty of larceny, the power does not extend to a case where the court of trial at no time indicated the possibility of the alternative verdict being returned. If a woman makes a promise to prostitute her body in return for a sum of money and has no intention of carrying out that promise, she is not guilty of larceny even if she receives a sum of money from her prospective client. The case would be only one of feminine duplicity matched against masculine simplicity, and the maxim

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caveat emptor would apply. Where the client pays over money in such circumstances, he does not expect to get his money back, and as he has parted with the property in the money and not merely the possession of it, the person so receiving the money cannot in any event be guilty of larceny: OPPENHEIMER *v.* FRAZER AND WYATT [1907] 2 K.B. 50; WHITEHORN BROS. *v.* DAVISON [1911] 1 K.B. 463. The Chairman in the present case never intimated to the jury the possibility of their returning a verdict of Guilty of false pretences and it would not be right for this court to substitute such a verdict where the jury had had no opportunity of applying their minds to the alternative offence.

W. R. Howard for the Crown. The three offences of which the appellant was found guilty were properly charged as larceny by a trick and could not have been properly held in law as obtaining the money by false pretences. The distinction is that in false pretences, when the victim passes over the money, he relinquishes entirely the right to property in the money; in larceny by a trick he does not relinquish his whole right to property in the money at the time, but only possession, although the right to property may be lost at a later stage according to the terms of the agreement. The feature common to the two offences is the lie acting on the mind of the victim. In false pretences there is no offence if the lie relates to a future payment or event; in larceny, it does not matter whether the lie relates to a present or future state of affairs. Here the sergeant did not intend to relinquish the whole of his right to property in the moneys paid until he had had sexual intercourse with the appellant. The conviction of larceny by a trick was, therefore, right.

At the conclusion of the arguments the Lord Chief Justice said that the court had come to the conclusion that the appeal against conviction should be dismissed, and would give its reasons next day. So far as sentence was concerned, the sentences would run concurrently and not consecutively.

Cur. adv. vult.

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December 6, 1960. The judgment of the court was delivered by

THE LORD CHIEF JUSTICE: This appellant was convicted at the County of London Sessions of three offences of larceny and was sentenced to six months' imprisonment on each count consecutive, that is to say, eighteen months in all. She has now appealed to this court against her conviction and against her sentence by leave of the court.

The short facts are these: On August 3, 1960, a sergeant of the American Army, who was on leave in London, was walking along a passageway in Soho at about 10 o'clock in the evening. The appellant was standing in a doorway of certain premises, and she spoke to him. According to his evidence, she asked if he was looking for a girl and offered to show him a good time. She invited him into the premises and, according to the sergeant, led him to understand that she was offering herself to him for prostitution for the sum of £2 10s. According to him, she took him along a passage to a locked door and asked him for 10s., which he understood was key money for a bedroom. He had not got 10s. and he gave her a £1 note. She, however, then took him down to the basement where the business of a so-called club was carried on. There were other girls present and a bar, and the appellant ordered drinks. The £1 was put upon the table and was taken away by the barmaid. A number of further drinks were ordered—soft drinks which the sergeant did not want—but the girl, getting a commission on them, ordered up to nine, I think, at a cost of between £1 and 30s. for two. Finally, she asked him for the £2 10s. He had not the change and he gave her £3, which was put upon the table, and later taken by the waitress. Still later, and before they left the basement, the appellant asked him for 30s. for the room. Again he put 30s. on the table, and this also was taken by the barmaid. They then left the basement, went upstairs and came to a door with a Yale lock. Another girl who was there said that there was a regular customer in there. The appellant said: "That will take rather a long time," and suggested that he should go round

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the corner down the street where she would later meet him. He went there, she did not turn up, and he spoke to the police. It is unnecessary to deal with what happened after that, save this, that the police officers gave evidence that they went and examined the door with the Yale lock and there was no bedroom there at all.

The appellant's evidence was that it was the sergeant who came up to her and said that he was looking for a nice girl, and that she suggested that he should go downstairs where there was a club and asked for 10s. as an entrance fee into the club. She said that down in the basement he never gave her £3 at all, but he only paid for the drinks, and that she never asked him for 30s. for a bedroom, and that that just did not occur.

The Chairman, in summing up, put the matter in this way: "The basis of the case for the Crown here is that as this woman never intended to prostitute her body—and, of course, that is a matter for you to decide upon the evidence—when that arrangement was made as between Mr. Pritzl [the sergeant] and herself it was made dishonestly, because she never intended to fulfil any obligation of any sort or description; it was because of that arrangement that the sergeant parted with his money, and had he known in fact what the truth was he would never have parted with it at all." Just before the jury retired he said: "Has the evidence satisfied you that this woman is a thief, and that in fact she was defrauding—because that is what it amounts to—this young man of his money, pretending that she was going to have intercourse with him, and inducing him in that way to part with those sums of money, knowing perfectly well she never had any intention of the sort in her mind at all? If you think that is the truth of this matter, you should convict her. If there is any reasonable doubt about it, she is entitled to be acquitted." The jury, after an absence of only twelve minutes, returned and found the appellant guilty on three counts pertaining to the three sums of money handed over to her, first the £1, then the £3 and finally the 30s. It is perfectly clear, therefore, that on the issues of fact the jury

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unhesitatingly accepted the evidence of the sergeant and rejected that of the appellant. Further, it is quite clear that they must have come to the conclusion that throughout the appellant was acting fraudulently.

The first question which arises is whether she was properly charged with larceny by a trick or whether this was a case of obtaining money by false pretences. The distinction between the two is a very fine one and, as we point out in a moment, the distinction is often largely academic. The authorities on the subject are numerous, and the result in each case must depend upon the exact facts and the true inferences to be drawn therefrom. The guiding test in each case is whether the person whose money is obtained meant to part with the property in the money, in which case it would—if the representation was false and as to an existing fact—be false pretences, or whether he meant only to part with possession, in which case, whether the false representation was as to an existing fact or as to the future, it would be a case of larceny by a trick.

It is urged here that when each sum of money was handed over the sergeant only intended to part with possession of the money; that it was only handed over as the result of a promise to render services; and that the property was only to pass on the performance of that promise. We have come to the conclusion that on the facts of this case the sergeant must have intended to pass not merely the possession, but also the property, in each sum. They were advance payments of money, the property in which passed not conditionally on the services being rendered, but in the hope that they would be rendered. It is to be observed that in his deposition the sergeant had said in regard to the first payment, that is the £1, that the appellant told him he would get it back afterwards, and it may be, therefore, that that resulted in the indictment being framed charging larceny by a trick. At the trial, however, such evidence was not given, and the court has come to the conclusion that in regard to that payment, as well as the subsequent ones, it was not a case of larceny by a trick.

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That the distinction, however, between the two offences is often academic can be seen from section 44 of the Larceny Act, 1916. Subsection (3) of that section provides: " If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money or valuable security in question in any such matter as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money, or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly." Subsection (4) deals with the converse position. It provides: " If on the trial of any indictment for obtaining any chattel, money, or valuable security by false pretences it is proved that the defendant stole the property in question he shall not by reason thereof be entitled to be acquitted of obtaining such property by false pretences."

No doubt the distinction between the two subsections is because false pretences is a misdemeanour and larceny by a trick is a felony. Accordingly, when a person is charged with false pretences which turns out to be a case of felony, larceny, the conviction for false pretences, the misdemeanour, can stand. Conversely, however, if the charge is one of the felony, larceny by a trick, and it turns out to be the misdemeanour of false pretences, conviction for the felony cannot stand, but the jury can find the prisoner guilty of the misdemeanour. No doubt, if at the trial for larceny it appears to be a case of false pretences, the judge will give the jury a proper direction in regard to what constitutes false pretences and, indeed, should allow counsel for the defence to address the jury on that basis: see, in that connection, RUSSELL (1944) 29 Cr.App.R. 165. That was not done in the present case, but the powers of this court depend upon section 5 (2) of the Criminal Appeal Act, 1907. That subsection provides: " Where an appellant (*a*) has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty for that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity." In other words, the jurisdiction of this court does not depend upon whether the judge did in fact sum up on the alternative basis, but upon whether the jury must have been satisfied of facts which proved him guilty of that other offence. No doubt, therefore, this is a jurisdiction which must be exercised with great caution, and the fact that the jury never had a proper direction as to the alternative offence, in this case false pretences, is a very relevant consideration.

In the present case, however, the jury unhesitatingly accepted the sergeant's evidence of the facts. In the opinion of this court the only possible inference from those facts was that at the very entrance to those premises the appellant represented that she was a prostitute; that she was ready and willing there and then to prostitute her body; and that she had available the necessary facilities, namely, a bedroom for that purpose. Those representations were clearly false and, as the jury have held by their verdict, were made fraudulently. Those representations, moreover, persisted at the time when each of the three payments were made and, indeed, induced the sergeant to make them.

It has been contended that those representations were only with regard to the future and could not, therefore, amount to false pretences. The court, however, cannot accept that argument. No doubt in precise point of time the representation that she would prostitute her body was as to the future in that the services promised would be performed after the payment, but it is impossible to divide the transaction up in that way. In any event, however, the representation in the present case that a room was available was a representation as to an existing fact. Mr. Rees-Davies, however, for the appellant, further urged that in regard to the first count, the £1 was paid, to the sergeant's knowledge and with his approval used to pay, for the first round of drinks. It is by no means clear from the transcript to which we have been referred as to whether that is right or whether the first round and the subsequent rounds of drinks were all paid for separately. But in any event it seems to this court that by then the offence charged in count 1 was complete. Mr. Rees-Davies further urged that no offences were committed in that all the payments were placed upon the table and were handed over to the barmaid. We cannot accede to that argument. The payments were intended by the sergeant for the appellant, and she obtained them. The fact that the barmaid eventually received them under some internal arrangement of the so-called club cannot affect the matter.

Accordingly, this court, while mindful of the caution with which the jurisdiction under section 5 (2) should be exercised, is of the opinion that verdicts of Guilty of false pretences should be substituted. The court is clear that the jury must have been satisfied of the facts which proved her guilty of those offences of false pretences.

As regards the appeal against sentence, the court, as already announced, has decided to make the sentences of six months on each count concurrent and not consecutive. In doing so it must not be thought that the consecutive sentences when passed were in any way wrong in principle. A severe sentence, intended to act as a deterrent for others, was clearly called for. The prisoner has, however, been on bail since August 25. She has met and married another American soldier who knows all about these offences, who is standing by her, and is making a home for her in this country. She must, of course, be punished, but the court feels that in the light of these fresh circumstances it would be right to reduce the total sentence by making the sentences concurrent sentences.

Conviction affirmed.
Sentence reduced.

Solicitors: Miles, Russell & Co., for the appellant; the Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD
AND MR. JUSTICE ASHWORTH

COLIN RAYMOND DAINES
WILLIAM EDWARD WILLIAMS

1960
Dec. 12

Practice — Application for Leave to Appeal to House of Lords — Administration of Justice Act, 1960 (8 *&* 9 *Eliz.* 2, *c.* 65), *s.* 1.

On an application for leave to appeal to the House of Lords, in a case where there does not seem to be any point of law of general public importance, the court will deal with the matter on the papers before it, without granting legal aid or leave to the applicant to be present.

Applications for leave to appeal to the House of Lords.

The applicants were convicted at Nottinghamshire Quarter Sessions on June 13, 1960, of officebreaking and larceny and were sentenced by the Chairman (T. R. Fitzwalter Butler, Esq.) to seven years' and five years' imprisonment respectively.

Both applicants obtained leave to appeal to the Court of Criminal Appeal against their convictions and on November 14, 1960, the court—the Lord Chief Justice, Ashworth and Elwes JJ.—heard the appeals. They held that in a summing-up which carefully stressed the need for corroboration of the evidence of an accomplice and fully explained what was meant by corroboration one matter had been referred to by the Chairman as being capable of amounting to corroboration which in fact could not do so. The court, however, applied the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and dismissed both appeals.

J. J. Deave for the applicants.

I. A. Hill for the Crown.

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COLIN RAYMOND DAINES WILLIAM EDWARD WILLIAMS

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THE LORD CHIEF JUSTICE: These are two applications for leave to appeal to the House of Lords against the decision of this court given on November 14 dismissing the two appeals against conviction. The court has carefully considered the applications, has heard Mr. Deave on behalf of the applicants, and has come to the clear conclusion that there is no point of law of general public importance involved in the decision. Accordingly, leave to appeal to the House of Lords is refused.

The court would only add this, that on reading the papers this seemed a perfectly plain case and that no point of law of general public importance arose; but, having regard to the fact that these were the first two applications under the Administration of Justice Act, 1960, they thought it right to grant legal aid and have the matter argued by counsel and for the applicants to be present. The court desires to say that in the future in a case where there does not seem to be any point of law of general public importance the court will deal with the matter on the papers without granting legal aid or leave to be present.

Applications refused.

Solicitors: Kimbers, for F. C. Crawley, Worksop, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE STREATFEILD, MR. JUSTICE GLYN-JONES, MR. JUSTICE ASHWORTH AND MR. JUSTICE ELWES

DUNCAN FREDERICK EVANS

1960
Dec. 21

Sentence — Probation Order — Order for Compensation Made at Same Time—Breach of Probation—Sentence of Imprisonment —Order for Compensation not Terminated—Criminal Justice Act, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 6 (3) (4), 8, 11 (2).

Where a probationer in whose case an order for compensation has been made at the time of the probation order subsequently commits a breach of the probation order, and is brought back either under section 6 or section 8 of the Criminal Justice Act, 1948, before the court which made the probation order or the supervising court and subsequently dealt with by fine, detention, Borstal training or imprisonment, the infliction of punishment does not put an end to the order for compensation.

Appeal against sentence.

On June 23, 1959, the appellant was convicted at Waltham Abbey Magistrates' Court on four charges of obtaining money by false pretences, and six similar offences were taken into consideration. The court placed the appellant on probation for three years and ordered him to pay compensation under section 11 (2) of the Criminal Justice Act, 1948. He subsequently committed a breach of the probation order by failing to report a change of address to the probation officer and in February 1960 was brought before Clacton Magistrates' Court (the supervising court) under section 6 of the Act. They committed him for sentence, under section 29 of the Magistrates' Courts Act, 1952, to Essex Quarter Sessions. On March 29, 1960, the Appeals Committee of Essex Quarter Sessions imposed sentences of twelve months' imprisonment (three consecutive and one concurrent).

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The substantial issue in the appeal was whether the order for compensation was terminated by the sentence of imprisonment.

E. D. R. Stone for the appellant. The sentence of imprisonment passed at Essex Quarter Sessions put an end to the order for compensation. That was the effect of the decision of this court in McCARTHY (unreported), October 25, 1960. Neither the court which originally convicted the offender could have passed a sentence of imprisonment and at the same time made an order for compensation, nor could the court which ultimately dealt with him. It would be anomalous, therefore, if the order for compensation survived despite the sentence of imprisonment, for that would mean, in effect, that two courts acting independently had brought about by their separate orders a state of affairs which one court could not have achieved. Further, as by section 6 (3) (*a*) and section 6 (4) (*b*) of the Act the second court is placed in the position of being as if it had just convicted the offender, that court must have, as it were, a clean slate on which to write its judgment, and any order or judgment of the original court must, therefore, cease to have effect. The court is invited, therefore, to quash the sentence of imprisonment and substitute for it a probation order, which will have the effect of keeping the order for compensation alive.

J. H. Buzzard for the Crown. McCARTHY (*supra*) should be regarded as having been decided *per incuriam*. By section 5 (4) of the Act of 1948 it is provided that where a probationer is sentenced for the offence for which he was placed on probation, the probation order shall cease to have effect, but there is no like provision with regard to any other orders made by the original court. Having regard to the fact that an order for compensation may accompany an order for conditional discharge as well as a probation order, as also may an order for costs, the omission must be regarded as significant, and the intention of the legislature must have been that all orders made

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by the original court other than a probation order should survive a sentence of imprisonment.

Cur. adv. vult.

December 21, 1960. The judgment of the court was read by

GLYN-JONES J. On June 23, 1959, the appellant was convicted by a court of summary jurisdiction sitting at Waltham Abbey upon four charges of obtaining by false pretences sums of money amounting in all to £14 15s. 0d. Six other similar offences were taken into consideration. The court made a probation order for three years and ordered the appellant to pay £14 15s. 0d. as compensation. The appellant, after his conviction, went to live at Clacton, where he found work as a baker and there he came under the supervision of the probation officer for that district. In September 1959, at the end of the summer season, he lost his employment because, according to his employer, he was a bad time-keeper. He told the probation officer that he hoped to find a job with another baker in Clacton; but, instead of doing so, he left Clacton and committed a breach of the conditions of his probation in that he did not report his change of address to the probation officer, and his whereabouts were not discovered until, a warrant having been issued for his apprehension, he was found in Leytonstone, where he had again obtained employment as a baker.

In accordance with the provisions of section 6 of the Criminal Justice Act, 1948, he was brought before the Clacton Magistrates' Court as the supervising court, and they, having heard his record, committed him in custody to the Essex Quarter Sessions for sentence, pursuant to section 29 of the Magistrates' Courts Act, 1952. He had been previously convicted on many occasions for offences of dishonesty, the first for larceny at the age of sixteen, when he was put on probation. Between the ages of twenty-two and twenty-six he was sentenced on five occasions for offences of larceny or false pretences to short sentences of imprisonment, and finally in

1951 to three years' corrective training, from which sentence he was released from prison in April 1953. Quarter sessions imposed sentences of twelve months' imprisonment on each of the four charges, of which three were concurrent and one consecutive, making two years in all, and it is against these sentences that the appellant appeals. Leave was given by the single judge on the ground that the magistrates by whom the appellant was originally convicted could not have been of opinion that his character and antecedents were such that greater punishment should be inflicted for his offences than the court had power to inflict (presumably on the ground that had they been of that opinion they would not have put him on probation); hence, in the view of the single judge, the Waltham Abbey magistrates had no jurisdiction to commit him to quarter sessions under section 29 of the Magistrates' Courts Act, for the supervising court, having the same character and antecedents to consider, must have based their opinion solely upon the conduct of the appellant subsequent to his conviction.

We do not find ourselves in agreement with the single judge. The Waltham magistrates were entitled to choose between punishment and probation. They doubtless had regard, as they properly might, to the fact that six years had gone by since the appellant served his period of corrective training and during those six years the appellant had not been convicted of dishonesty. There had been a conviction at the Essex Assizes in November 1956 for causing grievous bodily harm to the woman with whom he was living. This offence was committed by the appellant while in drink and there must have been extremely strong mitigation, for the learned judge imposed no punishment other than a probation order for twelve months. The appellant continued to live with the same woman and has maintained her and her children until sentenced by the Essex Quarter Sessions. In these circumstances the magistrates doubtless thought there was a chance that a probation order might save the appellant from reverting to a life of criminal dishonesty, and we have no reason to criticise their decision;

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but it does not follow that, if they had decided that the appellant must be punished, they would not have been of opinion that the appellant deserved greater punishment than they had power to inflict. Moreover, in our opinion, the supervising court is not fettered in the exercise of its discretion by a consideration of what might have been the opinion of the court in which the appellant was originally convicted. They have the advantage of knowing what the conduct of the probationer has been since the probation order was made and this may throw light on his character. Section 6 (3) (*a*) of the Criminal Justice Act, 1948, gives the court before whom a probationer is brought power to deal with him in any manner in which the court could deal with him if it had " just " convicted him; not in the manner in which it would have dealt with him if it had been the court which originally convicted him and was acting at the time of the original conviction.

In our opinion, the Clacton magistrates were acting within their powers in committing him to Essex Quarter Sessions for sentence. We came, however, to the conclusion that the total sentence of two years makes insufficient allowance for the effort which the appellant must have made to avoid conviction for dishonesty for six years after his sentence of three years' corrective training and we accordingly substituted such a sentence of imprisonment as enabled the appellant to be discharged on the day after the hearing of the appeal.

At the original hearing of this appeal Mr. Stone, for the appellant, invited the court to restore the probation order on the ground that the sentence of imprisonment had the effect of nullifying the order for payment of compensation made by the Waltham Abbey magistrates and thus depriving the victims of the appellant's dishonesty of their opportunity to enforce the order. Incidentally, counsel stated that the appellant had been at all times ready and willing to pay, but gave no reason why he had not even begun to do so.

It would not be right to withhold punishment which a court thought to be appropriate and necessary to be inflicted merely in order to keep alive an order for compensation; but if the punishment of a probationer by a fine or imprisonment does put an end to the order for compensation, that is a factor which might properly be taken into account by a court before whom the probationer is brought because he has committed another offence or is otherwise in breach of a requirement of the probation order. That was the view taken by this court in McCARTHY (unreported), October 25, 1960. In that case upon the making of a probation order the probationer had been ordered to pay £100 in compensation. He subsequently committed another offence for which he was brought before London Sessions and was sentenced to eighteen months' imprisonment and a concurrent sentence of seven days' imprisonment was imposed for the offence in respect of which the probation order had been made. In that case the attention of this court was drawn to section 6 of the Criminal Justice Act, 1948, and in particular to the power given by subsection (3) to a court to impose a fine for a breach of probation leaving the probation order in existence. Oddly enough, in that case counsel for the appellant argued that the order for compensation was still valid notwithstanding the sentence of seven days' imprisonment, while counsel for the Crown contended for the contrary view. In the end the court came to the conclusion that, since an order for compensation could not be attached to a sentence of imprisonment, the order for compensation had ceased to have effect, and with the object of restoring it the court set aside the sentence of imprisonment and substituted a fine of 20s. for the breach of probation, purporting to act under section 6 (3) of the 1948 Act.

As was stated by the Lord Chief Justice at the original hearing of the present appeal, the court has since had reason to think that the arguments in McCARTHY (*supra*) were founded upon the wrong section and this court of five judges has been constituted in order that that decision may be reviewed. Having reviewed that decision, the court is of opinion that it was wrong. In the first place the court mentioned in subsection (3) of section 6 of the Criminal Justice Act, 1948, is the court of summary jurisdiction before which the probationer is brought upon a breach by him of a requirement of the probation order. Courts of assize or quarter sessions are not empowered by that subsection to impose a fine for breach of probation. Moreover, McCarthy was a probationer who had committed another offence during the period of his probation, and it was for that offence that he had received his sentence of eighteen months' imprisonment. His case, therefore, fell to be considered under section 8 of the Act and not under section 6 at all. A probationer who commits a further offence during the period of his probation doubtless commits a breach of a requirement of his probation; but the proviso to subsection (6) of section 6 of the Act makes it clear that he must be dealt with under section 8 and not under section 6. The appellant in this appeal, however, has not committed another offence during the period of his probation, and the relevant section in this case is section 6.

The question which remains is this, namely, if a probationer in whose case an order for compensation has been made is subsequently dealt with and punished (whether by fine, detention, order for Borstal training or imprisonment) does the infliction of that punishment put an end to the order for compensation? For this purpose it seems immaterial whether the offender is dealt with under section 6 or under section 8, for the relevant provisions of both sections are similar. In section 6 it is provided that the court which deals with the probationer " may — . . . deal with [him], for the offence in respect of which the probation order was made, in any manner in which the court could deal with him if it had just convicted him of that offence " (section 6 (3) (*a*), relating to a court of summary jurisdiction) or " in any manner in which the court could deal with him if he had just been convicted before that court of that offence " (section 6 (4) (*b*), relating to a court of assize or quarter sessions).

Neither the court which originally convicted the offender nor that—whether or not it is the same court—which ultimately deals with him has power at the same time both to inflict punishment and to order payment of compensation; and it is said to be anomalous that the order for compensation should survive the infliction of punishment, for, if it does, the two courts have brought about by their separate orders a result which neither has power to order at one time. Moreover, it is argued that, if the second court had just convicted him, it would follow that he would be in the position of a man between conviction and sentence with no order or judgment against him. In other words, it is said, the second court must have, as it were, a clean slate on which to write and their order or judgment when made or given takes the place of any order or judgment of the original court which thereupon ceases to have effect. If this be so, then at the moment when the order or judgment of the second court comes into operation not only the probation order and any order for compensation but also any other order, for example, for payment of costs or for restitution of money or property under section 45 of the Larceny Act, 1916, is nullified.

In this case the court before which the appellant was brought in consequence of his breach of probation was the court of summary jurisdiction at Clacton. It is that court which dealt with him pursuant to section 6 (3) as if it had just convicted him. Instead of then inflicting punishment, the court committed him to quarter sessions for sentence; but it was before the court of summary jurisdiction that the appellant stood in the position of a man between conviction and sentence; and if the argument set out above be well founded, then all the orders made by the first court, including any order for costs, compensation or restitution, ceased to have effect when the appellant was committed for sentence.

When he appeared before quarter sessions, that court dealt with him pursuant to its powers under section 29 of the Criminal Justice Act, 1948, and not under section 6 (4) of that Act. But quarter sessions might have differed from the Clacton magistrates and, taking the view that the breach of probation was trivial, might have made no order, intending to leave the original probation order to stand. If so, does the original probation order revive, and with it the order for compensation, and any other order made by the original court? Or must quarter sessions make a fresh probation order and fresh orders for compensation, etc., to the extent to which the original orders had not been complied with?

This court is of opinion that the fallacy in the argument set out above is that it disregards the presence of the word "just" in the phrase "if it had just convicted him." The statute does not require the second court to put itself back in the position of the original court at the moment of conviction; and although the statute says that the second court may deal with the offender in any manner in which it would deal with him if it had *just* convicted him, that does not mean that the second court has in fact just convicted him; it has not. The second court is dealing with an offender who since his conviction may have reached an age when he qualifies for corrective training or preventive detention; he may have become too old for Borstal training; and the court has the advantage of hearing how he has behaved himself since the probation order was first made. The second court must deal with the offender in the light of all the circumstances and conditions which exist at the time when it deals with him, not those which existed when he was first convicted, and among them is the circumstance that a valid order or valid orders made against him by the first court is or are still in existence. This court does not think that by implication and in the absence of express words it can read into section 6 a provision that the orders of the first court are automatically nullified when the second court deals with the offender. The court's opinion is fortified by the fact that section 5 (4) of the Act expressly provides that, where a probationer is sentenced for the offence for which he was placed on probation, the probation order shall cease to have effect, and this would leave the original probation order in being in a case where the second court does not impose a sentence and negatives the suggestion that when the offender is dealt with by the second court it must be on the footing that all the orders of the original court are of no effect. There is not in the Act any express provision that any orders made by the original court other than a probation order are to cease to have effect when the offender is subsequently dealt with, and in view of the fact that an order for payment of compensation or for costs or for restitution may accompany an order for conditional discharge as well as an order for probation we think the omission is significant. Moreover, an order for payment of compensation vests in the victims of the crime in whose favour the order is made a right to enforce the order for their own benefit, and the court cannot attribute to Parliament an intention to take away that right in the absence of clear words having that effect.

The offender who is put upon probation and ordered to pay compensation is given a right by behaving himself to avoid punishment. If he chooses to throw away that chance and as a result is punished, the court sees nothing inequitable or unreasonable in his continuing to be under the liability to pay compensation, though, as we have already said, the fact that he is still liable to pay compensation may well be a factor to be taken into account by the sentencing court in assessing an appropriate punishment.

This court is of opinion that the decision in McCARTHY (*supra*) was wrong and holds that the appellant is still liable to pay compensation under the original order notwithstanding that he has since been sent to prison following his own breach of the original probation order.

Sentence reduced.
Order for compensation affirmed.

Solicitors: The Solicitor, Metropolitan Police, for the Crown.

[CENTRAL CRIMINAL COURT CASE]

BEFORE
THE LORD CHIEF JUSTICE

R. *v.* NAYLOR

1960
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Jurisdiction—Offence Committed out of United Kingdom—Offence Committed on British Aircraft—Larceny—Civil Aviation Act, 1949 (12, 13 & 14 *Geo.* 6, *c.* 67), *s.* 62 (1).

By section 62 (1) of the Civil Aviation Act, 1949, "Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

By virtue of the above subsection any act or omission which would constitute an offence if done or made in England (subject only to the exception of an offence which is clearly contrary to purely domestic legislation only) is made an offence if done or made on a British aircraft.

R. *v.* MARTIN (1956) 40 Cr.App.R. 68 considered.

Motion to quash indictment.

The defendant, Inga Monica Maria Naylor, was indicted in the Central Criminal Court with larceny. The statement of offence was larceny contrary to section 2 of the Larceny Act, 1916, and the particulars of offence alleged that the defendant "on the 30th day of June, 1960, on a British aircraft in flight over the high seas, stole three rings." Defending counsel moved to quash the indictment on the ground that there was no jurisdiction to try the defendant in England for the offence charged.

Victor Durand, Q.C., and *James Burge* for the defendant.
E. J. P. Cussen and *S. Alastair Morton* for the Crown.

THE LORD CHIEF JUSTICE: Mr. Durand moves to quash count 1 of the indictment in this case in which the prisoner is charged with larceny, contrary to section 2 of the Larceny Act, 1916. The particulars of that count are that the prisoner on June 30, 1960, on a British aircraft in flight over the high seas, stole three rings. The motion to quash is on the ground that that is not an offence known to English law for which the prisoner can be tried in this country.

The matter depends on the true construction of section 62 (1) of the Civil Aviation Act, 1949. That section, which has the sidenote " Jurisdiction," provides " any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be." It is, on any view, rather unfortunate language. The two rival contentions are that the subsection is saying in a shortened form what has already been provided in regard to British ships on the high seas, namely, that any act or omission which constituted an offence if committed in England constitutes an offence if committed on a British aircraft. On the other hand it is said that the subsection is dealing only with a matter of jurisdiction and venue, and that one must first of all find that under English law the acts complained of constitute offences if committed on a British aircraft.

The matter was considered by Devlin J. in R. *v.* MARTIN (1956) 40 Cr.App.R. 68 on a motion to quash an indictment containing counts concerning regulation 3 of the Dangerous Drugs Regulations, 1953. After carefully considering that case, I have come to the clear conclusion that the wide construction contended for should be put on section 62 of the Act of 1949. Although the language is not as clear as it should be, I have little doubt that it does cover acts or omissions which would constitute offences if committed in this country unless—and this is, in my opinion, where Devlin J.'s decision is in point—they are contrary to some purely domestic legislation. I need not repeat the arguments which were adduced in R. *v.* MARTIN (*supra*) with regard to the narrow scope that there would be for the operation of section 62 on the limited construction;

offences under the Treachery Act, 1940, bigamy (if one can imagine it taking place) and murder, by reason of section 9 of the Offences against the Person Act, 1861, are the only possible offences to which that section could then apply.

I have been referred to McNair's *Law of the Air*, 2nd ed., p. 118, in which, after the rival contentions have been set out, this passage occurs: "It is submitted, however, that their effect is not limited to questions of venue but is to render amenable to trial, wherever in the United Kingdom the offender may be, any person, whether British, foreign or stateless, who commits any offence on board an aircraft registered in the United Kingdom, or contravenes any of the relevant statutory provisions of civil aviation." That view so expressed was stated before R. *v.* MARTIN (*supra*) was decided, but I confess that for my part I would approach the matter in that way. What happened in R. *v.* MARTIN (*supra*) was that the offences concerned the Dangerous Drugs Regulations, 1953, which were clearly regulations to prevent the possession of dangerous drugs in this country. Apart from certain duly qualified medical practitioners and registered veterinary surgeons on the English registers, any other person, unless so authorised, who had possession of one of the drugs was guilty of an offence.

Devlin J. took the view, for which there is considerable support, that that is a purely domestic regulation, and went on to say that crimes conceived by the common law, which are mostly offences against the moral law, such as murder and theft, are not thought of as having territorial limits. Although he stated expressly that he was not saying that section 62 applies to offences at common law, it is quite clear from his judgment that he was taking the view that there was ample scope for the operation of section 62, in that common law offences might well be covered by the common law.

In my judgment, the approach to this matter is that any act or omission which would constitute an offence if done in England is made an offence if done on a British aircraft, subject to this, that if the offence in question is clearly one of

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domestic application only then, as in R. *v.* MARTIN (*supra*), section 62 does not cover that sort of offence. Accordingly I would dismiss the motion to quash.

Motion to quash indictment dismissed.

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE SALMON
AND MR. JUSTICE WINN

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DUDLEY LEIGHTON PETRIE

Prevention of Crime—Offensive Weapon—Distinction between Different Kinds of Weapon—Weapon not Made or Adapted for Use for Injury to Person—Razor—Summing-up—Burden of Proof—Prevention of Crime Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 14), *s.* 1 (4).

By section 1 (4) of the Prevention of Crime Act, 1953: "'Offensive weapon' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

A distinction must be drawn between different kinds of offensive weapon within the meaning of the above section. Once possession of an offensive weapon in a public place is proved, if the article is one made or adapted for use for causing injury to the person, *e.g.*, a cosh, knuckleduster or revolver, then the onus shifts to the defence to prove, on a balance of probabilities, lawful authority or reasonable excuse for the possession; but if the article is not made or adapted for such use, *e.g.*, a sandbag or razor, the burden remains on the prosecution throughout to show that the defendant carried it with the intention of using it to injure, and the jury should be so directed.

Where, therefore, the definition of "offensive weapon" was not read to the jury in the course of a summing-up, and the jury were directed that the possession of a razor in the circumstances of the case was possession of an offensive weapon in a

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public place, which shifted the onus on to the defendant to show that he had lawful authority or a reasonable excuse for the possession of it,

Held, that this was a misdirection on burden of proof necessitating the quashing of the conviction.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on November 22, 1960, of being in possession of an offensive weapon in a public place and was sentenced by the Chairman (R. E. Seaton, Esq.) to six months' imprisonment.

The appellant was a passenger in a motor-car, which collided with a motor-scooter. The driver of the motor-scooter was injured, but a pillion passenger, who was uninjured, went to the car and remonstrated with the driver of the car and accused him of being responsible for the accident. A fight between the appellant and the pillion passenger ensued. When the police arrived on the scene the appellant was sitting in the passenger seat of the car, and when he got out a "cut-throat" razor was found under the seat. The appellant subsequently made a statement to the police. The material portions of the summing-up are set out in the judgment.

S. Stout-Kerr for the appellant. The direction of the Chairman on onus of proof was a misdirection. The article in question was not one "made or adapted for use for causing injury to the person," and the onus did not shift to the appellant merely because he was proved to have been in possession of the article in a public place. The onus remained throughout on the prosecution to show that the defendant intended to use the article to cause injury, and the jury were obviously confused and misled. Further, the Chairman told them that the fact that the statement to the police was made under duress would not render it inadmissible. It was for the prosecution to prove that the statement was made freely and voluntarily.

H. J. Leonard for the Crown. It cannot be contended that a razor is an offensive weapon within the meaning of the subsection unless the prosecution prove that it was carried in a

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public place by the defendant with the intention of causing injury to some person, and it must be conceded that the direction on onus of proof was wrong. The evidence against the appellant was, however, very strong, especially in view of his own statement, and it is submitted that this is a case where the court might apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

SALMON J.: This appellant was convicted at the London Sessions before the Chairman of being in possession of an offensive weapon in a public place, and he was acquitted on a count charging him with assault occasioning actual bodily harm.

The facts of the case are quite short. It appears that on October 1, 1960, the appellant attended a wedding, and the celebration of the wedding went on till half past eight in the evening. He then, with another man called Walker, went in a motor-car to fetch some other guests. When the motor-car was outside a public-house in Ladbroke Grove it was reversed by Walker, who was driving it, with the appellant sitting next to him in the passenger seat; on being reversed, the motor-car collided with a scooter which was driven by a man called Briggs, who had another man called Franklin riding as a passenger. Briggs was injured and Franklin, thinking that the motor-car was going to drive away, got off the scooter and came to the front of the motor-car and remonstrated violently with the driver. There was a very sharp conflict of evidence with regard to what then ensued. According to Briggs and Franklin and a man called Cowan, who was called on behalf of the prosecution, there was a fight in which Franklin was knocked to the ground by Walker and kicked in the stomach, when he was lying on the ground, by the appellant. It was also part of the case for the prosecution that the appellant drew a razor, an old-fashioned razor which is commonly called a "cut-throat" razor, from his pocket and threatened Franklin with it and, indeed, inflicted a wound on Franklin with that razor. The appellant and his witnesses denied that anything

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of that kind had happened, but said that Franklin had kicked the appellant and all that the appellant did was to kick back in self-defence. When the police arrived on the scene the appellant was sitting in the motor-car in the passenger seat. He was asked to get out, and under the passenger seat there was found a " cut-throat " razor. The appellant was asked if he knew anything about the razor. He denied any knowledge of it. There is no question but that the appellant did tell a lie to the police constable on that occasion. He admits it and says that he lied because he was afraid. The appellant was then taken to the police station and signed a statement the contents of which afforded ample evidence on which the jury could have convicted him.

According to the police officer, that statement was a perfectly voluntary statement made by the appellant after caution. According to the appellant, he was stripped and severely beaten in the police station, and he said he signed the statement only as the result of being hurt and terrified by the police. According to the police, when charged with the two offences the appellant said that he was guilty of each of them. In his evidence the appellant admitted that he did have a razor in his pocket when he was in the car. He said that when he had set out in the morning to go to the wedding he put the razor in his pocket in order to shave the bridegroom. He said that when the trouble started at Ladbroke Grove he took the razor out of his pocket and put it down in the car so that it would be out of his reach. Apparently he appreciated that, if he got into a fight, the temptation to use it might be irresistible.

It seems to this court that there was ample evidence on which the jury, if properly directed, could have found this appellant guilty of being in possession of an offensive weapon. This is an unfortunate case, because the court is of the opinion that the summing-up was wholly wrong and that it is impossible to say that, if the correct direction had been given, the appellant might not have been acquitted.

Section 1 of the Prevention of Crime Act, 1953, reads as follows: " Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence . . ." Then in subsection (4) an offensive weapon is defined thus: " ' Offensive weapon ' means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him."

The learned Chairman never read that definition of " offensive weapon " to the jury. It may be that he did not even refresh his own memory about it, because he directed the jury, as will presently appear, that the mere carrying of that razor in Ladbroke Grove was necessarily the possession of an offensive weapon in a public place, which shifted the onus on to the appellant to prove that he had a reasonable excuse for being in possession of it. It is clear that the definition section of the Act contemplates offensive weapons of, at any rate, two classes, namely (a) an article which *per se* is an offensive weapon, that is to say, an article made or adapted for use for causing injury to the person; and (b) an article which, though it is not made or adapted for such use, is carried with the intent so to use it. A cosh, a knuckleduster, and a revolver are examples of articles in the first class. A sandbag and a razor are examples of articles in the second class. No jury could find that a sandbag was in the first class, because there would be no evidence to support such a finding. It seems to this court that the same is true about an ordinary razor. There are some articles which are equivocal, for example, knives. It would always be for a jury to say whether a knife was made or adapted for use for causing injury to the person. It would depend upon the view the jury took of the knife.

It is absolutely essential in summing up to the jury in a case of this sort not to muddle up the definition of " offensive weapon " because if the article in question is an offensive weapon *per se*, once possession in a public place is proved, the onus shifts to the defence to prove, on a balance of probability, that there was lawful authority or reasonable excuse for carrying the weapon. If the accused fails to discharge this onus, the jury must convict him. On the other hand, if the article is something like a sandbag or a razor, the onus is on the prosecution to show that it was carried with the intention of using it to injure. The onus remains on the prosecution throughout, and if at the end of the day the jury are left in doubt about the intent of the accused he is entitled to be acquitted.

This is the direction which was given by the learned Chairman: " But if you come to the conclusion on what you have heard here that this accused was in possession of that razor—and, of course, the Crown have to satisfy you about that—then the circumstances in which there was possession, namely, the collision at Ladbroke Grove, are such that the onus shifts to him to show that his possession was legitimate, lawful and reasonable; it is for him to satisfy you that that is probably the case." Later he said: " The essence of the matter is that the onus of proving possession of the razor is on the Crown. No doubt you will be satisfied that a razor is an offensive weapon. Once the Crown have proved that he was in possession of that weapon the onus of proof shifts to him to satisfy you as a reasonable probability that he had it in his possession for a lawful purpose, that there was a reasonable excuse for having it." Mr. Leonard has very fairly said that that cannot be supported because he cannot argue that a razor is an offensive weapon within the meaning of the Act, unless it is proved by the Crown that it was carried in a public place with the intention of injuring some person.

The jury were obviously somewhat puzzled by the direction that had been given to them and, after they had retired for some time, they came back and asked for further directions, and the foreman said: " We are not quite clear as to what constitutes carrying an offensive weapon." The learned Chairman then said: " The charge here is being in possession of an offensive weapon: that in a certain public place at Ladbroke Grove without lawful authority or reasonable excuse the

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accused had with him an offensive weapon. If you have in your motor-car an offensive weapon, that would amount to carrying in law. In fact, of course, that is what happened, assuming you accept what was said by this man"—that is to say, if you believe the admission the accused made in the witness-box. "It is said, on the other hand, by Mr. Franklin and by other persons that this man had the weapon in his hand, and in fact was seen to draw it against Franklin. Now, that would be possession." The jury then found the appellant guilty of possessing an offensive weapon and not guilty of assault.

It is clear, as already indicated, there was abundant evidence that the appellant was carrying this razor with the intent necessary to make it an offensive weapon within the meaning of the Act. Indeed, if a man is found carrying a razor in a public place, there is at any rate some evidence on which a jury could say that he had the necessary intent. It would be entirely a matter for the jury. But it was quite wrong for the Chairman to direct the jury as a matter of law that the appellant was in possession of an offensive weapon and that the onus was on him to prove lawful authority or reasonable excuse.

If the jury had wholly accepted the evidence of the witnesses of the prosecution, they would no doubt have convicted the appellant on the second count as well as on the first. It is accordingly plain that the jury may well have been in grave doubt about the evidence called for the prosecution as well as that called for the defence. If they were, and they had been given a proper direction, which was that the onus was on the prosecution throughout to prove the intent with which the appellant was in possession of the razor, they would have acquitted him. But if, being in grave doubt about all the evidence, they were wrongly told, as they were, that they must convict on the count of being in possession of an offensive weapon unless they accepted the appellant's story, then they had no alternative other than to convict.

In these circumstances this court feels that it would be very unsafe to allow this conviction to stand, as it rests on

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what is a wholly wrong direction as to the onus of proof. The only other matter to which this court wishes to allude is this, that when in the presence of the jury learned counsel for the defence indicated that he wished to object to the admissibility in evidence of the alleged statement by the appellant on the ground that it had been obtained by duress, the learned Chairman made this remarkable observation: "That would not make it inadmissible, would it?", to which counsel said: "That it is not his statement, my Lord, in fact. (The Chairman): Well, which, duress or that it is not his statement? (Mr. Stout-Kerr): My Lord, as a result of duress . . . (The Chairman): You see, if a statement is taken under duress that does not make it inadmissible, does it?" That is a very surprising remark. The Chairman then proceeded to try the question as to whether or not the statement was admissible and he admitted it. It was clearly inadmissible unless the prosecution satisfied him that it was free and voluntary. It seems a pity that the learned Chairman in the course of his summing-up did not instruct the jury as to what would be the effect of their disbelieving the police evidence about the circumstances in which the statement was taken; but apparently that was a contingency which he did not contemplate.

For the reasons I have given the court feels that this conviction cannot be allowed to stand, and it will accordingly be quashed.

Conviction quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE WINN AND MR. JUSTICE NIELD

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Diplomatic Privilege—Clerk in Office of India High Commissioner—Extent of Immunity to Criminal Proceedings—Alleged Waiver—Diplomatic Privileges Act, 1708 (7 *Anne, c.* 12), *s.* 1—*Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 18), *s.* 1 (4) (5).

A person who is entitled to diplomatic immunity is not bound to claim it in court. Proceedings brought against such a person are without jurisdiction unless and until there has been a waiver which will make the proceedings live and give jurisdiction to the court. Such waiver must be by a person with full knowledge of his rights and by or on behalf of the chief representative of the State in question; the person entitled to the privilege cannot waive it, unless he does so as agent or on behalf of the head of the State. No distinction can be drawn between the privilege of a public Minister and those on his staff, at any rate when dealing with something which is *malum prohibitum.* The above-mentioned principles of law apply alike to civil proceedings and criminal charges, at any rate in the case of *malum prohibitum.* There is, however, a possible exception to exemption from criminal proceedings on the ground of diplomatic immunity, where the person entitled to diplomatic immunity engages in acts contrary to the safety and welfare of the State where he resides.

KENT (1941) 28 Cr.App.R. 23; *sub nom.* A. B. [1941] 1 K.B. 454; ENGELKE *v.* MUSMANN [1928] A.C. 433 and DICKINSON *v.* DEL SOLAR [1930] 1 K.B. 376 referred to and approved.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on August 9, 1960, of obtaining a season ticket from the London Transport Executive by false pretences and

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attempting to obtain money by false pretences, and was sentenced by the Deputy-Chairman (F. H. Cassels, Esq.) to four months' imprisonment.

The case against the appellant was that on March 3, 1960, he, having purchased the previous day a three-monthly season ticket for a journey between Baker Street and Clapham South, obtained a duplicate from the London Transport Executive on the ground that he had lost the original ticket, that he had given the original ticket to a friend who lived with him and had continued to use the duplicate himself. The small sum of money which he had attempted to obtain was reimbursement for fares he paid until the duplicate was issued.

The single judge had given leave to appeal because the appellant, a native of India, appeared to be on the staff of the High Commissioner for India, in the Passport Division, and entitled to diplomatic immunity at all times, being on the list kept by the Secretary of State under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952.

In the committal proceedings one of the police officers when cross-examined said that he had ascertained that the appellant was on the staff of the High Commissioner. That again emerged when the appellant gave evidence at the trial, but nothing more was then thought of the matter. After an adjournment, the probation officer told the Deputy-Chairman that he had been in touch with the High Commissioner's office, who were under the impression that the appellant was entitled to diplomatic immunity. The Deputy-Chairman then said that as far as that was concerned the appellant must at some time, if he had ever thought of it, have waived it, and that it was a bit late to claim it then.

After the proceedings, and as late as November 21, 1960, the Deputy High Commissioner had written to the Commonwealth Relations Office saying that the appellant "is and was entitled to diplomatic immunity" in accordance with the Act of 1952 and that in order not to impede the course of justice and as a very special case the High Commissioner was prepared to waive the immunity without prejudice to the interests of the High Commissioner, and on the clear understanding that it would not be treated as a precedent in the future.

Christmas Humphreys, Q.C. (*J. A. Kirpal* with him), for the appellant. The proceedings against the appellant were without jurisdiction as he was a person entitled to diplomatic immunity under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, which had not been waived. Any waiver the appellant himself may have purported to make was ineffective, for waiver can be made by the Head of State only and not by the person entitled to the immunity. This position is abundantly clear as regards civil proceedings not only from section 1 (5) of the Act of 1952, but also from the decision of this court in KENT (1941) 28 Cr. App.R. 23; *sub nom.* A. B. [1941] 1 K.B. 454, where the earlier decisions of ENGELKE *v.* MUSMANN [1928] A.C. 433 and DICKINSON *v.* DEL SOLAR [1930] 1 K.B. 376 to the same effect were referred to with approval. It is true that in KENT (at pp. 26 and 457 of the respective reports) the position with regard to criminal proceedings was left open and there appears to be no express authority on the matter, but the view of the textbook writers appears to be that the immunity extends to criminal proceedings also, with the possible exception of acts directed against the safety and welfare of the State in which the person entitled to diplomatic immunity is residing. [He referred to *Archbold*, 34th ed., § 25, and *Halsbury's Laws*, 3rd ed., Vol. 7, p. 269.]

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C.) (*J. R. Cumming-Bruce* with him) as *amici curiae*. Careful consideration has been given to all the cases and passages from textbooks referred to in the note to *Halsbury*, 3rd ed., Vol. 7, p. 269, and nothing has been discovered which supports the proposition that any distinction is to be drawn between the privilege of the representative of the State himself and the privilege of those on his staff, or that the privilege does not extend to criminal proceedings, with the possible exception already mentioned. The waiver in the present case could only be made by the High Commissioner and was not made till after the trial. It cannot be contended, therefore, that the examining magistrate had any jurisdiction to commit the appellant for trial. The committal, therefore, was bad (GEE AND OTHERS, 25 Cr.App.R. 198; [1936] 2 K.B. 442) and the trial accordingly was a nullity. [He referred also to MIGHELL *v.* SULTAN OF JOHORE [1894] 1 Q.B. 149, at pp. 159–162.]

Ian Kennedy for the prosecutor (the British Transport Commission) adopted the same argument.

THE LORD CHIEF JUSTICE: This appellant was convicted at the County of London Sessions of obtaining a season ticket by false pretences and also attempting to obtain money by false pretences, and was sentenced to four months' imprisonment on each count concurrently. He now appeals from that conviction by leave of the court.

The facts, so far as it is necessary to state them, are in a very short compass. The case against this appellant was that on March 3, 1960, having on the previous day purchased a three-monthly season ticket for a journey between Baker Street and Clapham South, he then applied for and later obtained a duplicate from London Transport on the ground that he had lost the original ticket, and that in fact—this was the case for the prosecution—he had given the original ticket to a friend who was or had been living in the same house as he was. The appellant then continued to use the duplicate himself. The small sum of money which it was alleged he had obtained by false pretences was in respect of reimbursement of the fares he had paid until the duplicate ticket was issued.

The reason why leave to appeal was given by the single judge in this case was that the appellant appeared to be on the staff of the High Commissioner of India. He was employed in the Passport Division of the Indian High Commissioner's office in London, and was entitled to diplomatic immunity. It appears that at all times he has been entitled to diplomatic

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immunity, being upon the list kept by the Secretary of State under section 1 (4) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. This matter, however, was unknown to the court which tried him, and only came to light in these circumstances: It appeared for the first time in the committal proceedings that, when one of the police witnesses was cross-examined, he stated that he had ascertained that the appellant was on the staff of the High Commissioner for India. That again emerged when the appellant himself gave evidence at the trial, but nothing more was thought of the matter until the probation officer was called and was questioned as to what steps the India Office were likely to take in regard to the appellant, he having been convicted of these offences by the jury. There was an adjournment while the probation officer got in touch with the High Commissioner's office, and when that had been done and the matter was again before the court, he told the learned Deputy-Chairman that he had been in touch with a representative of the High Commissioner's office, who was under the impression that the appellant was entitled to diplomatic immunity. The Deputy-Chairman then said: "Of course, so far as diplomatic immunity is concerned, the defendant must at some time if he ever thought of it, have waived it. It is a bit late to claim it now." The probation officer said: "I thought I would mention it now," and Mr. Kennedy, who was appearing for the prosecution, said: "I think the position is that he is entitled to it, but he expressly waived it before the magistrate either by himself or by his solicitor, I forget which." I should add that it has been conceded in this case that in fact the solicitor then appearing for the appellant before the committing magistrate did then purport to waive the immunity.

After those proceedings, and as late as November 1960, the Deputy High Commissioner wrote to the Commonwealth Relations Office in these terms in a letter dated November 21, 1960: "The High Commissioner desires me to say that Mr. Madan is and was entitled to diplomatic immunity in accordance with the Diplomatic Immunities (Commonwealth

Countries and Republic of Ireland) Act, 1952. I am further directed to say that, in order not to impede the course of justice and as a very special case, the High Commissioner is prepared to waive the immunity in the present instance without any prejudice to the interests of this High Commission and on the clear understanding that it will not be treated as a precedent in the future."

The appellant, notwithstanding that, asserts that that waiver could operate only from November 21, 1960, that the waiver must be a waiver by the High Commissioner and not by himself or by his solicitor, and that in those circumstances both the committing magistrate and the court of trial had no jurisdiction to deal with him at all; in other words, all the proceedings prior to November 21 were a complete nullity, and it would follow that he has not been properly convicted.

Certain things are, we think, clear. In the first place, it is not for someone who is entitled to diplomatic immunity to claim it in the courts. It is unnecessary to refer to the authorities, but we think it is clear that proceedings brought against somebody, certainly civil proceedings brought against somebody, entitled to diplomatic immunity are in fact proceedings without jurisdiction and null and void unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court. Moreover, it is clear that that waiver must be a waiver by a person with full knowledge of his rights and a waiver by or on behalf of the chief representative of the State in question. In other words, it is not the person entitled to a privilege who may waive it unless, of course, he does so as agent or on behalf of the representative of the country concerned; it must be the waiver of the representative of the State. That that is clear can, we think, be seen from the Act itself to which I have referred. Subsection (5) of section 1 provides: "Notwithstanding anything in the preceding provisions of this section (*a*) a chief representative may waive any immunity conferred by or under this section on himself or on a member of his staff, or on a member of his family or of the family of a member of his staff, or on a person in the service of the Government of the country which he represents . . ."

Quite apart from that subsection, the law, as we understand it, has always been that the privilege can only be waived by the accredited diplomatic agent. It is sufficient, perhaps, in this connection to refer to the case of KENT (1941) 28 Cr.App. R. 23; *sub nom.* A. B. [1941] 1 K.B. 454, where Lord Caldecote deals with the matter at pp. 26 and 457 of the respective reports. He says this: " The first thing to be said is that the privilege claimed by the appellant is a privilege which is derived from, and in law is, the privilege of the ambassador and ultimately of the State which sends the ambassador. It was a privilege which was originally based on the comity of nations, before it was declared by the Diplomatic Privileges Act (7 Anne, c. 12) in 1708. Lord Buckmaster, in the case of ENGELKE *v.* MUSMANN [1928] A.C. 433, at p. 440, said: ' My Lords, the privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the statute 7 Anne, chapter 12'; and the statement that I have made that the privilege is the privilege of the ambassador was stated by Lord Hewart, Chief Justice, in his judgment in DICKINSON *v.* DEL SOLAR [1930] 1 K.B. 376, at p. 380: ' The privilege is the privilege of the sovereign by whom the diplomatic agent is accredited, and it may be waived with the sanction of the sovereign or of the official superior of the agent.' " Lord Caldecote, in his judgment in that case, further referred to MARSHALL *v.* CRITICO (1808) 9 East 447, where Lord Ellenborough said: " This is not a privilege of the person, but of the State which he represents." Accordingly, in the judgment of this court it matters not that the appellant may have expressly through his solicitor waived his diplomatic immunity. That is the general position as the court understands it in regard to civil proceedings.

So far as criminal proceedings are concerned, there is no express authority, as we understand it, on the matter. Indeed, in KENT, to which I have already referred, Lord Caldecote, at

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pp. 26 and 457 of the respective reports, expressly kept the question open in these terms: " I find it unnecessary to decide whether or not the diplomatic privilege of the character discussed before us can be claimed by a member of a diplomatic staff in connection with a criminal charge. . . ."

The matter is dealt with in *Halsbury's Laws*, 3rd ed., Vol. 7, at p. 269, where it is stated in these terms: " He "—and it is there dealing with the representative of the State concerned—" is exempt from the criminal jurisdiction of the state in which he resides and is not subject to interference or arrest except, possibly, in the one instance of his engaging in acts contrary to its safety and welfare." In a long note dealing with that passage the rival theories on the matter are set out, and the note ends in these terms: " There is no modern English authority on the subject, but judicial statements suggest that the courts do not regard the immunity to be complete in point of law, at any rate as regards persons other than the public minister himself, whatever may be the position in practice having regard to amity in foreign relations."

The Attorney-General, to whom the court is indebted for his argument in this case, informs the court that he has been through the various cases and passages dealt with in that note, and that he can find no passage whatsoever which supports the proposition that any distinction is to be drawn between the privilege of the representative of the State himself and the privilege of those on his staff. When one is dealing with something, as in this case, which is *malum prohibitum*, this court takes the view that in a case such as this there is no distinction to be drawn between the principles of law applicable in the case of civil proceedings and criminal charges. It would follow, therefore, that in the present case this appellant was subject to proceedings carried on without jurisdiction in that all the time he was entitled to diplomatic immunity. The sole question is whether the effect of the letter of the Deputy High Commissioner of November 21, 1960, waiving the immunity can be said to operate in any way retrospectively. It is enough for our decision in the present case to say that on its

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face it does not purport to do so. What the true position would be if it had purported to be retrospective it is unnecessary for us to say. It is sufficient that in the present case it does not on any view purport to be retrospective.

In these circumstances this court has no option but to quash both convictions. It makes no further order.

Convictions quashed.

Solicitors: Percy Short & Cuthbert for the appellant; Treasury Solicitor; H. B. Gilmour for the prosecutor.

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE SALMON
AND MR. JUSTICE WINN

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See p. 107

Sentence—Preventive Detention—Scottish Conviction—Proof that Offence was Punishable in Scotland with Imprisonment for Two Years or More—Certificate by Lord Advocate not Produced—Sentence Invalid—Criminal Justice Act, 1948 (10 *&* 11 *Geo.* 6, *c.* 58), *s.* 21 (2) (*b*).

To render a sentence of preventive detention valid, where a Scottish conviction is relied on as one of the qualifying convictions, evidence that the offence was punishable on indictment in Scotland by a term of two years' imprisonment or more should be given by production of a certificate of the Lord Advocate under section 23 (3) of the Criminal Justice Act, 1948; and if there has been no prima facie evidence on this matter, the sentence is invalid and will be set aside by the Court of Criminal Appeal.

Quaere whether prima facie evidence must also be given that the three qualifying convictions were convictions on indictment.

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Appeal against sentence.

The appellant was convicted at the County of London Sessions on September 14, 1960, of being found by night in a building with intent to steal and was sentenced by the Chairman (R. E. Seaton, Esq.) to seven years' preventive detention.

The appellant admitted three previous convictions in Scotland of theft, opening lockfast premises with intent and theft by housebreaking after previous conviction, and theft by housebreaking after previous conviction, respectively. No certificate of the Lord Advocate to the effect that the respective offences were punishable on indictment in Scotland with imprisonment for a term of two years or more was put in by the prosecution.

M. L. Worsley for the appellant. The three convictions necessary to establish a sentence of preventive detention were never proved. There was no prima facie evidence that any of the offences were punishable on indictment in Scotland with imprisonment for a term of two years or more. Such proof was a condition precedent to the sentence. Scottish law is a question of fact in the courts of England and must be strictly proved. As the condition precedent was never fulfilled, this court should not now receive fresh evidence with regard to Scottish law. Further, prima facie evidence should have been given that each of the convictions was in fact a conviction on indictment, and another condition precedent was, therefore, not fulfilled. [He referred to McGRATH [1949] 2 All E.R. 495 and CAMERON (1952) unreported.]

H. J. Leonard for the Crown. The sentence remains valid if it subsequently turns out that the conditions set out in section 21 (2) (*b*) of the Act had in fact been fulfilled and leave is sought now to produce the certificate of the Lord Advocate, which was actually available at the time of the sentence though it was not produced at the Sessions.

Cur. adv. vult.

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January 30. The judgment of the court was read by:

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at the County of London Sessions to being found by night in a building with intent to steal therein and was sentenced to seven years' preventive detention. He now appeals against that sentence by leave of the single judge. He was found at about 10 p.m. on August 13, 1960, on the fourth floor of the Globe Theatre standing by some clothes.

He is thirty-eight and has some eighteen previous convictions, all in respect of offences of dishonesty. It is unnecessary to enumerate them. It suffices to say that the court is satisfied that, if it was shown that he qualified for preventive detention, he fully deserved the sentence that was imposed.

The ground on which leave to appeal was given concerned the absence of proof that the convictions set out in the notice under section 23 of the Criminal Justice Act, 1948, which were convictions in Scotland, were convictions which qualified the appellant for preventive detention.

Section 21 (2) of the Criminal Justice Act, 1948, provides that preventive detention may be imposed if a person who is not less than thirty years of age (a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on indictment on at least three previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence, and was on at least two of those occasions sentenced to Borstal training, imprisonment or corrective training. There was no doubt that the appellant was shown to qualify under (a) above, but as regards (b) the position was this, that, while he was undoubtedly over thirty, all that was established was that he had been previously convicted as follows: at the Inverness Sheriff Court on March 2, 1954, of theft after previous convictions, and sentenced to nine months' imprisonment; at Glasgow Sheriff Court on July 28, 1955, of theft (two charges), opening lockfast premises with intent, theft by housebreaking after previous convictions, sentenced to eighteen months' imprisonment; at Glasgow Sheriff Court on November 28, 1957, of theft by housebreaking after previous convictions, sentenced to twenty-one months' imprisonment, and made subject to section 22 of the Criminal Justice (Scotland) Act, 1949. In other words, there was no evidence before the learned Chairman that those offences under Scottish law were (1) punishable only on indictment; (2) punishable with imprisonment for a term of two years or more.

It is to be observed that it is provided by section 23 (3) of the Act of 1948 that " For the purposes of subsections (1) and (2) of section twenty-one of this Act a certificate purporting to be signed by or on behalf of the Lord Advocate that an offence is punishable on indictment in Scotland with imprisonment for a term of two years or more shall be evidence of the matter so certified." In fact such a certificate had been obtained by the prosecution and the validity thereof has been confirmed to this court, but no such certificate was put in at the trial. In those circumstances it is said on behalf of the appellant that, Scottish law being a question of fact in our courts, the conditions precedent to a sentence of preventive detention were never established, that fresh evidence as to Scottish law cannot be received in this court, and that accordingly the sentence of preventive detention must be set aside. As we have already said, such a sentence was fully merited and the point taken is a mere technicality, but nevertheless, if good, the appellant is entitled to avail himself of it.

The point is a narrow one. It amounts to this: Is a sentence of preventive detention good if in fact the conditions in section 21 (2) (*b*) turn out to have been fulfilled or must at any rate prima facie evidence that they are satisfied be given in the trial court before such a sentence can be imposed?

The court has with considerable reluctance come to the conclusion that the latter view is correct. While, if the former view were right, a sentence of preventive detention would be quashed should it turn out that the prisoner did not qualify for such a sentence, that would involve the initiation by the convicted person of an appeal. It seems to us that the correct view is that, whereas the fact of the convictions must be strictly proved in accordance with section 23 (1) of the Act, at any rate prima facie proof must be given of the other matters laid down as qualifying conditions in section 21 (2) (*b*). Indeed section 23 (3) appears to have been inserted for this very purpose. Moreover, we are told that in practice a certificate under section 23 (3) is put in and counsel for the prosecution concedes that this should have been done and states that in the present case failure to do so was a slip.

In these circumstances the court has no option but to set aside the sentence of preventive detention and to substitute a sentence appropriate in all the circumstances to the offence in question. The court will substitute a sentence of eighteen months' imprisonment.

Finally, the court would mention that a further point was taken on behalf of the appellant to the effect that it had also not been proved that the three convictions relied on were in fact convictions on indictment. In the circumstances the court finds it unnecessary to express any opinion on that point. Accordingly, the appeal will be allowed and a sentence of eighteen months' imprisonment substituted.

Sentence varied.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE SALMON
AND MR. JUSTICE WINN

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Sentence — Corrective Training — Scottish Conviction — Proof that Offence was Punishable in Scotland with Imprisonment for Two Years or More — Certificate by Lord Advocate not Produced—Sentence Invalid—Criminal Justice Act, 1948 (10 & 11 *Geo.* 6, *c.* 58), *s.* 21 (1) (*b*).

To render a sentence of corrective training valid, where a Scottish conviction is relied on as one of the qualifying convictions, evidence that the offence was punishable in Scotland by a term of two years' imprisonment or more should be given by production of a certificate from the Lord Advocate under section 23 (3) of the Criminal Justice Act, 1948, and if there has been no prima facie evidence on this matter the sentence is invalid and will be set aside by the Court of Criminal Appeal.

See p.157 ~~*Quaere*, whether prima facie evidence must also be given that the three qualifying convictions were convictions on indictment~~.

Appeal against sentence.

The appellant was convicted at Peterborough Quarter Sessions on October 13, 1960, of being found by night in a building with intent to steal therein and was sentenced by the Chairman (His Honour Judge Lawson Campbell) to three years' corrective training.

M. D. L. Worsley for the appellant.

Cur. adv. vult.

January 30. The judgment of the court was read by:

THE LORD CHIEF JUSTICE: This appellant pleaded guilty at the Soke of Peterborough Quarter Sessions to being found by night in a building with intent to steal therein and was sentenced to three years' corrective training. He now appeals

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against that sentence by leave of the single judge on the ground that this case raises the same point in regard to the proof of qualifying conditions as was raised in the case of CLARKSON (*supra*), the previous case.

It is clear to this court that on the merits a sentence of three years' corrective training was the appropriate sentence, but in this case, as in CLARKSON's (*supra*), the qualifying convictions were in Scotland and there was no prima facie evidence that the offences for which he was convicted were punishable on indictment with imprisonment for a term of two years or more as provided by section 21 (1) (*b*) of the Criminal Justice Act, 1948.

Having regard to the decision of this court in the previous case of CLARKSON, the court has no option but to set aside the sentence of corrective training. The appeal accordingly will be allowed and the court substitutes a sentence of nine months' imprisonment.

Sentence varied.

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Feb. 6

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE WINN
AND MR. JUSTICE WIDGERY

DORIS LAKE

Sentence — Preventive Detention — Sentence of Preventive Detention Already being Served — Further Sentence to Date from Conviction—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), s. 21 (2).

Where a prisoner already serving a sentence of preventive detention is sentenced to a further term of preventive detention, the proper practice is to make the second term date from conviction and thus absorb any unexpired portion of the previous term.

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Feb. 6

DORIS LAKE

Parker
L.C.J.,
Winn J.,
Widgery J.

Appeal against sentence.

The appellant pleaded Guilty at Buckinghamshire Quarter Sessions on November 7, 1960, to housebreaking, and asked for four other offences to be taken into consideration, committed during an escape from prison. She was sentenced by the Chairman (His Honour Judge Sir Edgar Dale) to ten years' preventive detention, consecutive to a sentence of eight years' preventive detention passed on her on March 9, 1955.

P. Perrins for the appellant. Despite the appellant's shocking record a consecutive sentence of this length was in all the circumstances too severe.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant pleaded Guilty at Buckinghamshire Quarter Sessions to breaking into a house and stealing property to the value of £100. She asked for four other offences to be taken into consideration in connection with a stolen cheque book and a Post Office Savings Bank book. She was sentenced by the Chairman to ten years' preventive detention, which was made consecutive to a sentence of eight years' preventive detention passed on her on March 9, 1955. It is against that sentence that she now appeals to this court by leave of the single judge.

This woman of forty-six has a most extraordinary history. Since 1930 she has either been sentenced in respect of or had taken into consideration no less than eighty-one offences of either housebreaking or larceny. It is quite clear that she is a menace. After Borstal training she had various sentences of imprisonment in 1938, 1939, 1941, 1943 and 1944. Coming to more recent times, in 1946 she had four years' penal servitude, in 1949 five years' preventive detention and in 1955, as I have already said, on March 9 she was sentenced to eight years' preventive detention. While serving that sentence, on September 3, 1960, she absconded from Holloway Prison, and the present offences were committed in the three weeks that she was on the run before she was re-arrested on September 24.

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DORIS LAKE

Parker L.C.J., Winn J., Widgery J.

The real question here is whether it is proper in a case of this sort to make the sentence of preventive detention consecutive to the previous period of preventive detention. The court can see nothing wrong in law in doing so, but it does appear to the court that care must be taken to see that the prisoner is not in effect punished twice, first by a sentence of preventive detention and secondly by a forfeiture of the period which he or she would have spent on licence. To take the present case, we are told that she would have had sixteen months on licence, which she will no longer have, so that as a result of these offences she has ten years' preventive detention and the loss of sixteen months on licence. In those circumstances the court feels that the better practice in cases of this sort is to make the sentence of preventive detention, whatever it is, date from conviction, in which case it will absorb, as it were, the unexpired portion of any previous sentence of preventive detention. Moreover, that seems much more in line with the position when a sentence of preventive detention is imposed on a person who is on licence during a previous sentence of preventive detention. In such a case section 26 (6) of the Prison Act, 1952, provides that the unexpired portion of the previous sentence of preventive detention ceases so soon as a fresh sentence of preventive detention is imposed. Accordingly, in these circumstances the court thinks that the proper course in the present case is to make the sentence of ten years' preventive detention date from conviction.

Sentence varied.

BEFORE
THE LORD CHIEF JUSTICE, MR. JUSTICE WINN
AND MR. JUSTICE WIDGERY

AMOS FREDERICK BRADLEY

1961
Feb. 13

Companies—Disqualification for Acting as Director—Disqualification to Date from Conviction—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 188.

Unless a statute contains an express provision to the contrary, any order of disqualification must run from the date of conviction. An order, therefore, under section 188 of the Companies Act, 1948, disqualifying a person convicted of fraud or company offences for acting as a director of a company for a specified period must run from the date of conviction, and such an order made to run from the date of convicted person's discharge from prison is bad in law.

PHILLIPS (1955) 39 Cr.App.R. 87 applied.

Appeal against sentence.

The appellant was convicted at the Central Criminal Court on September 12, 1960, of fraudulent trading and fraudulent conversion and was sentenced by Sir Gerald Dodson, sitting as a Special Commissioner, to concurrent terms of two years' and six years' imprisonment, and was ordered to be disqualified, under section 188 of the Companies Act, 1948, for acting as a director of a company for five years, the period to commence on the day of his discharge from prison.

J. W. Harkess for the appellant.

Sebag Shaw for the Crown.

THE LORD CHIEF JUSTICE: This appellant pleaded Guilty at the Central Criminal Court to fraudulent trading and nine offences of fraudulent conversion. He was sentenced by the Commissioner to two years' imprisonment on the count for

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Parker L.C.J., Winn J., Widgery J.

fraudulent trading, and six years on each of the other counts, concurrent, and he was also made the subject of an order under section 188 of the Companies Act, 1948, for five years, to commence on the day of his discharge from prison. He now appeals to this court by leave of the single judge against that sentence. In particular, the single judge thought it right that the court should consider whether the Commissioner had jurisdiction to make the order under section 188 of the Companies Act date from the discharge from prison rather than from the date of his conviction.

The appellant was the sole director of a company known as Basic Materials, Ltd., which carried on business as merchants and suppliers of industrial raw materials. The company was wound up in December 1957 when it was found to have liabilities of some £33,000 and assets of only £600, and the statement of affairs disclosed that most of the deficiency had been paid to and used by the appellant. It also appeared that during the three years of the company's existence the creditors of the company, who had supplied goods to the value of about £30,000, received no more than £1,600. It was, accordingly, a bad case, and although the Commissioner took into consideration the fact that this man of forty-seven was previously of good character, he felt that in all the circumstances he was constrained to pass a sentence in all of six years. The court has very carefully considered the matter. As has been said many times, this court will only interfere when they feel that the judge has gone wrong in principle. This was a serious case. It is quite impossible to say that the Commissioner erred in principle and, accordingly, the court will not reduce that sentence.

So far, however, as the order under section 188 of the Companies Act, 1948, is concerned, Mr. Shaw, who has appeared here for the prosecution, has frankly admitted that he cannot support the order. The section, so far as it is material, reads: "Where (*a*) a person is convicted on indictment of any offence in connection with the promotion, formation or management of a company; or (*b*) in the course of winding up a company it appears that a person . . . (ii) has otherwise been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company; the court may make an order that that person shall not, without the leave of the court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of a company for such period not exceeding five years as may be specified in the order."

The learned Commissioner felt that an order under that section could play no useful part in this case unless it was made to date from the time when the appellant had served his sentence, and it does appear that similar orders have been made on occasion in the past. It seems to this court, however, that in principle, unless the statute contains express words to that effect, a disqualification must date from the date of conviction. Thus, in the case of disqualification under the Road Traffic Acts, where somewhat similar words occur, it has always been held by this court that the disqualification must date from the date of conviction: see, in that connection, GRAHAM [1955] Crim.L.R. 319 and PHILLIPS (1955) 39 Cr.App.R. 87. Accordingly, the court will set aside that order in so far as it was expressed to run from the date of the appellant's discharge from prison and substitute an order for five years as from the date of conviction.

Sentence varied.

1961
Feb. 20

PRACTICE NOTE

SENTENCES OF CORRECTIVE TRAINING

At the sitting of the court (the Lord Chief Justice, Mr. Justice Edmund Davies and Mr. Justice Widgery) on February 20, 1961, the following statement was made by:

THE LORD CHIEF JUSTICE: It will be remembered that as long ago as 1950 in GRANT (1950) 34 Cr.App.R. 230; [1951] 1 K.B. 500, the Court of Criminal Appeal laid down that a sentence of corrective training should, as a general rule, be for a period of not less than three years. At pp. 235 and 507 of the respective reports Lord Goddard said: "If corrective training is to be imposed, three years, which means in effect two years, is the least sentence which is likely to be of any use, and, as I have said, the court has laid that down after we have had the advantage of hearing the views of the Prison Commissioners, who are the authority entrusted by Parliament with providing for corrective training." Ever since that decision the court has endeavoured to adhere to that principle and as a result a number of sentences of two years' corrective training have been set aside.

The court has recently been informed that as a result of experience the Prison Commissioners have found it possible to provide a form of training which can be effected in a two years' sentence. Different individuals, of course, respond more or less rapidly to training and the Commissioners no longer take the view that a three years' sentence is in all cases the shortest period in which effective training can be given.

In these circumstances it is open to the sentencing court to impose a sentence of two years' corrective training if they feel that this would be likely to provide an adequate period of training for the prisoner concerned, and this court will no longer set aside the sentence merely because it is a two years' sentence.

PRACTICE NOTE

1961
March 6

CONDITIONAL BINDING OVER OF WITNESSES

At the sitting of the court (the Lord Chief Justice, Mr. Justice Winn and Mr. Justice Widgery) the following statement was made by:

THE LORD CHIEF JUSTICE: The attention of the court has been drawn to the fact that defending counsel at quarter sessions and at assizes have on occasion been taken by surprise to find that witnesses whom they expected to be able to cross-examine have been conditionally bound over. The original depositions will, of course, contain the letters C.B.O. against the witnesses conditionally bound over, and in addition there will be attached a form setting out the names of those witnesses: *cf.* Form 23 of the Magistrates' Courts (Forms) Rules, 1952, and rule 12 (2) (*g*) of the Magistrates' Courts Rules, 1952. When, however, the defence obtain copies of these depositions, either from the committing court or from the court of trial, it seems that on occasions the letters C.B.O. do not appear and Form 23 is not attached.

After consulting the Home Office the court has decided to issue this Practice Note drawing the attention of Justices' Clerks, Clerks of the Peace and Clerks of Assize to this situation. Care must be taken to ensure that accurate copies of the depositions are made and as an added precaution the court considers that Form 23 should in every case be attached to the copies, even if it only discloses that no witnesses are conditionally bound over. In this way it is hoped to avoid the occurrence of mistakes in the future.

[JUDICIAL COMMITTEE OF THE PRIVY COUNCIL]

BEFORE

1961
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LORD TUCKER, LORD DENNING AND LORD MORRIS OF BORTH-Y-GEST

ROSE *v.* THE QUEEN

Murder—Diminished Responsibility—Direction to Jury—Reference to Borderline of Insanity—Insanity to be Considered in Broad Popular Sense—Homicide Act, 1957 (5 *&* 6 *Eliz.* 2, *c.* 11), *s.* 2.

There is no fixed rule that in every case where the defence of diminished responsibility is raised that the jury must necessarily be directed that the test is always to be the borderline of insanity. There may be cases in which the abnormality of mind relied on cannot readily be related to any of the generally recognised types of insanity. If, however, insanity is to be taken into consideration, as will usually be the case, the word must be used in its broad popular sense and not the strict sense of the M'Naghten Rules. The direction to the jury must always be related to the particular evidence, and the words "borderline" and "insanity" may in some cases not be helpful.

BYRNE (1960) 44 Cr.App.R. 246; [1960] 2 Q.B. 396 considered and explained.

Interpretation of "abnormality of mind" and "mental responsibility" by the Lord Chief Justice (Lord Parker) at pp. 252 and 403–404 of the respective reports approved.

Appeal *in forma pauperis* from conviction of murder in the Supreme Court of the Bahama Islands, where on May 14, 1960, after a trial before Henderson L.J. and a jury, the appellant was sentenced to death.

The following statement of facts is taken from the judgment of the Judicial Committee. The appellant, Elvan Rose, was charged and tried together with another man named James Ingraham for the murder of Samuel Otis King on February 17, 1960. Ingraham was also convicted and sentenced to death, but did not appeal. On February 17, 1960, both men were prisoners

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serving sentences in Fox Hill Prison, where the deceased man was employed as an overseer. At about 3.30 p.m. an assistant turnkey named Gay was knocked unconscious in a corridor of the prison. He did not see who struck the blow, but soon afterwards both accused men were seen bending over him as though searching him. They then went to the main gate where King was in charge and attempted, without success, to open it. The appellant told King to open it and, when he refused, took out a knife and threatened him with it. King broke away from the appellant, who followed him and, after telling him that he was going to kill him because he would not give up the keys, stabbed him with the knife, inflicting two wounds, one of which was fatal. It was not disputed on the appeal that the appellant killed King and that, if the jury had been properly directed on the defence of diminished responsibility, the verdict could not be questioned.

In the case of the appellant the defence of diminished responsibility was raised under section 2 (1) of the Homicide (Special Defences) Act, 1959, of the Bahama Islands, in the terms of section 2 (1) of the Homicide Act, 1957, of England and Wales. Section 2 (1) provides: "Where a person kills . . . another, he shall not be convicted of murder if he was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility for his acts . . . in doing . . . the killing."

J. T. Molony, Q.C., and *D. A. Grant* for the appellant.

Neil Lawson, Q.C., and *Mervyn Heald* for the Crown.

March 6. The judgment of the Board was delivered by:

LORD TUCKER, who stated the facts, summarised the effect of the medical evidence adduced by the defence in support of the plea of diminished responsibility, and of the evidence called in rebuttal by the prosecution, and continued: The contention of the appellant is that the jury did not have a correct or sufficient direction in law as to the nature of this defence and

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in particular were misdirected as to the meaning of the words "mental responsibility."

Before turning to the passage of which complaint is made their Lordships desire to emphasise that the Chief Justice was engaged in the difficult task of instructing the jury as to the meaning, and application to the evidence in the present case, of a difficult section which has introduced a novel conception into English criminal law, and moreover he was doing so before the Court of Criminal Appeal in this country had given judgment in BYRNE (1960) 44 Cr.App.R. 246; [1960] 2 Q.B. 396. After reading the section of the Act and explaining the burden of proof the Chief Justice read to the jury the following extract from the summing-up of Paull J. in WALDEN (1959) 43 Cr.App. R. 201; [1959] 1 W.L.R. 1008, which had received the approval of the Court of Criminal Appeal in England: "There are some cases you may think where a man . . . is wandering on the borderline between being sane and insane where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the borderline. . . . He is not really fully responsible for what he has done.' Now, you may think, and it is entirely a matter for you, that that is what is meant by those words in the Act '. . . such abnormality as substantially impairs his mental responsibility.' In other words, he is not really responsible for what he has done. His responsibility, if not wholly gone, has been impaired."

The Chief Justice then proceeded: "That, I think, might help you when you are considering this question of impaired responsibility. And, since that is supposed to be, or is said to be, a borderline case of sanity or insanity, then it seems to me that I should explain very briefly what we understand by insanity in law." Then he quoted in full the rule in M'NAGHTEN'S CASE (1843) 10 Cl. & F. 200, reading it out verbatim. He observed that it is "not this case, but I want you to see what insanity is so that you can see whether it was borderline or not."

After quoting it he went on: "Wrong means legally wrong. Do you think here, therefore, that there was this question of borderline? That's what you've got to look at. Do you think that Rose was suffering from this abnormality?"

It is said by counsel for the appellant that Rose's abnormality should not be judged by the test whether it bordered on insanity or not, and that no such test is justified by the language of the section. In any event, it is not a conclusive test to be applied in every case. Furthermore, if insanity is to be introduced into the application of the section there is no justification for confining it to legal insanity within the M'Naghten definition. For the Crown it was argued that "mental responsibility" in the section means "mental responsibility in law"—*i.e.*, the standard required for a man to be held responsible in law for his acts; and that standard was to be found in the rules in M'Naghten's Case, because there was no other standard to which it could be referred. It was right, therefore, said the Crown, for the Chief Justice to invite the jury to apply the test of borderline of insanity as defined in the M'Naghten Rules.

Their Lordships cannot accept the Crown's contention. It would be an undue limitation of the wide words of the section. In BYRNE ((1960) 44 Cr.App.R. at p. 252; [1960] 2 Q.B. at p. 403) the Lord Chief Justice, delivering the judgment of the Court of Criminal Appeal, said: "'Abnormality of mind,' which has to be contrasted with the time-honoured expression in the M'Naghten Rules 'defect of reason,' means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will power to control his physical acts." Later, after referring to the citations from Scots cases in SPRIGGS (1958) 42 Cr.App.R. 69; [1958] 1 Q.B. 270, he continued: "They indicate that such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity or being on the borderline of insanity."

Their Lordships respectfully accept this interpretation of the words "abnormality of mind" and "mental responsibility" as authoritative and correct. They would not, however, consider that the Court of Criminal Appeal was intending to lay down that in every case the jury must necessarily be directed that the test is always to be the borderline of insanity. There may be cases in which the abnormality of mind relied upon cannot readily be related to any of the generally recognised types of "insanity." If, however, insanity is to be taken into consideration, as undoubtedly will usually be the case, the word must be used in its broad popular sense. It cannot too often be emphasised that there is no formula that can safely be used in every case—the direction to the jury must always be related to the particular evidence that has been given and there may be cases where the words "borderline" and "insanity" might not be helpful.

In the result their Lordships are of opinion that the direction given to the jury by which they were told to assess the degree of abnormality of mind in terms of the borderline between legal insanity and legal sanity as laid down in the M'Naghten Rules was a serious and vital misdirection which would, no doubt, not have been given had the Chief Justice had the benefit of Lord Parker's judgment in BYRNE (*supra*).

There was a further passage in the summing-up strongly relied on by counsel for the appellant. Towards the end of his charge the Chief Justice, referring to the killing, said: "Do you think that he did that under the influence of this

CORRIGENDA

Please insert in Part 2

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For last paragraph read:

[THE LORD CHIEF JUSTICE: Does the sentence remain valid if it subsequently turns out that the conditions set out in section 21 (2) (b) have in fact been fulfilled and can the production of the certificate of the Lord Advocate at this stage cure the omission?

H. J. Leonard, for the Crown. The certificate can now be produced. It was actually available at the time of the sentence, though it was not produced at the Sessions. Its production at that time to prove the matter of Scottish law seems, however, to be a condition precedent to the validity of the sentence.]

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Delete the second paragraph of the headnote, beginning *Quaere*.

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diminished responsibility, or do you think that he knew just exactly what he was doing? Did he intend to do it? If so, murder; if not, manslaughter." This was a misdirection. A man may know what he was doing and intend to do it and yet suffer from such abnormality of mind as substantially impairs his mental responsibility. This misdirection, coming where it did, may have been a determining factor in the jury's verdict.

[After referring to two other passages which, in their Lordships' view, were open to criticism, but would not by themselves have been sufficient to vitiate the verdict, his Lordship continued:] In the event, their Lordships are of opinion that the appellant was deprived of his right to have his defence of diminished responsibility properly considered by the jury and they must consequently humbly advise Her Majesty that the verdict of guilty of murder and the sentence of death passed upon the appellant should be quashed and a verdict of guilty of manslaughter and a sentence of imprisonment for life substituted therefor.

Verdict and sentence substituted.

Solicitors: Blyth, Dutton, Wright & Bennett for the appellant; Charles Russell & Co. for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GORMAN AND
MR. JUSTICE SALMON

1961
April 17

SIDNEY CUGULLERE

Offensive Weapon—Possession—Knowledge—Pickaxe Handles in Back of Stolen Van Driven by Defendant—Defence of no Knowledge that Articles were in Van—Misdirection in Summing-up—Prevention of Crime Act, 1953 (1 & 2 *Eliz.* 2, *c.* 14), *s.* 1 (1) (4).

By section 1 (1) of the Prevention of Crime Act, 1953, " Any person who without lawful authority or excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence."

The words " has with him in any public place " mean " *knowingly* has with him in any public place " and the jury should be directed that it is for the prosecution to prove that the defendant knowingly had with him in a public place the alleged offensive weapon.

The appellant was found driving a stolen motor-van, in the back of which were three pickaxe handles bound with adhesive tape, which the prosecution alleged constituted offensive weapons. The appellant's defence was that he did not know that the implements were in the back of the van. The Chairman directed the jury that the appellant was in possession of the implements and that it was for him to prove that he had a lawful excuse for being in possession.

Held, that in view of the misdirection on onus of proof, the conviction of the appellant on the charge of having offensive weapons with him in a public place must be quashed.

Appeal against conviction.

The appellant pleaded guilty at the County of London Sessions on November 30, 1960, to taking and driving away a motor-car without the consent of the owner and to larceny. He was convicted of receiving a stolen motor-van and of having offensive weapons with him in a public place, contrary to section 1 (1) of the Prevention of Crime Act, 1953. On the last count, which alone was the subject of appeal, he was sentenced

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by the Chairman (R. E. Seaton, Esq.) to eighteen months' imprisonment, consecutive to sentences on the other counts, the total period of imprisonment amounting to three years.

On October 4, 1960, two policemen in a police car saw the appellant driving a stolen motor-van. The appellant got out of the van and was captured after a chase. In the back of the van were found three pickaxe handles bound with adhesive tape which were alleged by the prosecution to constitute offensive weapons. At the time the appellant said to a police officer: " You know what they are for. Why bother to ask?," but at the trial his defence was that he did not know either that the van had been stolen or that the implements were in the van. The relevant portions of the summing-up appear in the judgment.

Colin Nicholls, for the appellant. The Chairman assumed that the appellant was in possession of the offensive weapons, which was really an issue in the case and a matter in respect of which the burden of proof rested on the prosecution. His direction that the burden rested on the appellant was a misdirection. Further, there was no direction of the meaning of " offensive weapon," which this court in PETRIE (*ante*, p. 72) regarded as essential on a charge of this kind.

Miss N. M. Collins, for the Crown. The summing-up cannot be considered satisfactory, but the evidence of possession of the alleged offensive weapons by the appellant, in view of his conduct and original statement to the police, was very strong, and it is submitted that the court might consider the case an appropriate one in which to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

SALMON J.: This appellant pleaded guilty at the London Sessions to taking and driving away a motor-car without the consent of the owner and to a count of larceny. He pleaded not guilty to receiving a stolen motor-van and having offensive weapons with him in a public place. He was convicted by the jury on both the counts to which he pleaded not guilty, and he now appeals, by leave of the court, from his conviction on the count relating to the possession of offensive weapons. On that count, count 5 in the indictment, he received a sentence of eighteen months' imprisonment, which was consecutive to the other terms of imprisonment imposed upon him.

The material facts are very short. On October 4, 1960, two policemen in a police car saw the appellant driving a stolen Austin van. The police car drove alongside the van and one of the policemen opened the van door next to the driving seat. The appellant got out of this door and ran away; after a chase he was ultimately caught by one of the policemen. In the back of the van were found three pickaxe handles bound with adhesive tape (alleged by the prosecution to be offensive weapons) and a number of other articles clearly designed to be used for illegal and aggressive purposes. The appellant at the time was shown the pickaxe handles, and a policeman after warning him said: "Would you care to tell me about them?" The appellant replied: "You know what they are for. Why bother to ask?" His defence at the trial was that he had no idea that the van he was driving had been stolen and that he had no idea that the implements to which I have referred were in the back of the van. He said that he ran away because he knew he was wanted by the police for the offences to which he pleaded guilty.

The section under which he was convicted on count 5, section 1 (1) of the Prevention of Crime Act, 1953, reads as follows: "Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence." Offensive weapons are defined in subsection (4) as "any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him." This court is clearly of the opinion that the words "has with him in any public place" must mean "knowingly has with him in any public place." If some innocent person has a cosh slipped into his pocket by an escaping rogue, he would not be guilty of having it with him within the meaning of the section, because he would be quite innocent of any knowledge that it had been put into his pocket. In the judgment of this court, the section cannot apply in circumstances such as those. It is, therefore, extremely important in any case under this section for the judge to give a careful direction to the jury on the issue of possession. The first thing the jury have to be satisfied about, and it is always a question for the jury, is whether the accused person knowingly had with him the alleged offensive weapon.

The summing-up on this point is far from clear and, indeed, most unsatisfactory. The real question for the jury here was: Did the appellant know that these pickaxe handles were in the back of the van? The jury should have been told that if they were in any real doubt about this question, the appellant was entitled to be acquitted. The learned Chairman dealt with the topic of possession thus; he said: " Let me say at once, Mr. Hutchinson "—who was then appearing for the defence—" a moment or so ago told you—and this is a matter of law—that there was no evidence that his client was in possession. With very great respect to Mr. Hutchinson, that is wrong." So far, the summing-up is unexceptionable, because obviously there was evidence that these pickaxe handles were in the possession of the appellant, but the learned Chairman goes on to say: " He was in possession "—that was the very question of fact which it was for the jury to determine. Then the learned Chairman said: " What he is saying is that he had reasonable and lawful excuse for being in possession because it was an innocent possession, coupled with the van that he was repairing, that there was not any unlawful reason that they were there when he was driving the van back upon his lawful occasion to return it to the owner." That is obviously rather muddled, and could only have confused the jury. The learned Chairman certainly does not say, as he should have done: " Are you satisfied beyond reasonable doubt that this accused man knew that these pickaxe handles were in the back

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Parker L.C.J., Gorman J., Salmon J.

of the van? " The whole defence was primarily based on the proposition that the accused did not know that the pickaxe handles were in the back of the van. Then again, later on the learned Chairman says: " The next thing is the question of possession. This is one of those cases where, once the prosecution have proved possession, the onus shifts to the accused to show that he was in lawful possession. Here there is evidence that these implements, amongst other things, were in this sack in the back of the van under his control. He has said: ' My possession was lawful because I had had that van for the purpose of re-spraying and re-painting, and at the behest of the owner I was in the process of returning it to him when I was stopped. Indeed, I had no idea what was in the back of it.' As I say, the onus shifts to him." That is clearly wrong, because, as far as the question of possession was concerned, the onus remained throughout on the Crown to prove that the appellant knew that the pickaxe handles were in the van.

The court is clearly of the opinion that on that ground alone this conviction cannot be allowed to stand. The summing-up is also open to criticism on the ground that the learned Chairman did not direct the jury about the meaning of " offensive weapon " and leave to the jury the question whether these were articles adapted for use for causing injury to the person or intended by the appellant for such use. This matter was dealt with by this court recently in PETRIE (*ante*, p. 72), and it is unnecessary to repeat anything that was said on that occasion.

As already indicated, this court has come to the conclusion that the summing-up in relation to possession was so unsatisfactory that it would be unsafe to allow this conviction to stand, and it will accordingly be quashed.

Conviction quashed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

[IN THE HOUSE OF LORDS]

BEFORE

VISCOUNT SIMONDS, LORD REID, LORD TUCKER,
LORD MORRIS OF BORTH-Y-GEST AND LORD HODSON

SHAW *v.* DIRECTOR OF PUBLIC PROSECUTIONS

1961
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Conspiracy to Corrupt Public Morals—Invitation to Resort to Prostitutes for Fornication and Perverted Practices—Whether still Indictable Misdemeanour.

Prostitution—Living on Immoral Earnings—Supply of Services to Prostitutes for Reward—Booklet Containing Names, Addresses, etc., of Prostitutes—Fees Received by Defendant from Prostitutes and from Sale of Booklet—Sexual Offences Act, 1956 (4 & 5 *Eliz.* 2, *c.* 69), *s.* 30.

Obscene Libel—Intention or Purpose of Defendant not Relevant—Publication of Booklet Containing Names, Addresses, etc., of Prostitutes—Admissible Evidence—Obscene Publications Act, 1959 (7 & 8 *Eliz.* 2, *c.* 66), *s.* 2.

The appellant published a booklet with the object of assisting prostitutes in plying their trade in view of the restrictions imposed by the Street Offences Act, 1959. The booklet contained the names, addresses, telephone numbers and in some cases photographs of prostitutes and in some cases abbreviations indicating willingness to indulge in various perversions. The appellant received fees from the prostitutes whom he canvassed and advertised and from the sale by a shopkeeper of copies of the booklet. Prostitutes paid for advertisements out of their earnings and in some cases obtained custom by means of the booklet. At the trial evidence was admitted (*a*) from prostitutes with regard to the meaning of the abbreviations, with regard to the results of the advertisements, the ages of the persons who responded to them, and the practices indulged in by them; and (*b*) from police officers with regard to the premises indicated in the advertisement and the objects found by them therein. The appellant was convicted on an indictment which charged (i) conspiracy to corrupt public morals; (ii) living on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act, 1956; (iii) publishing an obscene publication, contrary to section 2 of the Obscene Publications Act, 1959.

Held (i) with regard to the offence of conspiracy to corrupt public morals, by the House of Lords, affirming the decision of the Court of Criminal Appeal (*per* Viscount Simonds, Lord Tucker, Lord Morris of Borth-y-Gest and Lord Hodson), such a common law misdemeanour still exists, and is indictable as being a conspiracy to commit a wrongful act calculated to cause public injury or possibly as conspiracy to commit an immoral offence, *viz.*, conduct calculated and intended to corrupt public morals, and that the conviction was right. *Per* Lord Reid: Though there is no general offence of conspiracy to corrupt public morals known to the law, a public invitation to indulge in sexual perversion constitutes the common law misdemeanour of an outrage on public decency, and therefore the conspiracy laid in the present indictment, so far as it related to an invitation to resort to certain of the prostitutes for certain forms of perversion, was indictable as a conspiracy to commit a crime.

(ii) With regard to the offence of living on the earnings of prostitution, by the House of Lords, affirming the decision of the Court of Criminal Appeal, that the conviction was right. Though a person who is paid for goods or services out of the earnings of prostitution does not necessarily commit an offence under the Sexual Offences Act, 1956, a person does not necessarily escape from its provisions by receiving payment for the goods or services that he supplies to a prostitute. A person should be held to be living in whole or in part on the earnings of prostitution if he is paid by a prostitute for goods or services supplied by him to her for the purpose of her prostitution which he would not supply but for the fact that she was a prostitute.

Per Lord Reid: " Living on " normally means living on parasitically.

(iii) With regard to the offence of publishing an obscene publication, by the Court of Criminal Appeal (no leave for appeal to the House of Lords having been given in respect of the conviction on this count), that the test under the Obscene Publications Act, 1959, being whether the article tended to deprave or corrupt persons who read it, the intent or purpose of the appellant in publishing the article was irrelevant and was not a matter on which the jury should have been directed. With regard to the evidence above referred to, though the whole of it was admissible on the charge of conspiracy to corrupt public morals, only the evidence of the prostitutes with regard to the meaning of the abbreviations was admissible on this charge.

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Appeal by the prisoner from order of the Court of Criminal Appeal dismissing appeal against conviction.

The appellant was convicted at the Central Criminal Court on September 21, 1960, of conspiracy to corrupt public morals, living on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act, 1956, and publishing an obscene publication, contrary to section 2 of the Obscene Publications Act, 1959. He was sentenced by the Commissioner (Judge Maxwell Turner) to concurrent terms of nine months' imprisonment.

The appellant published a magazine or booklet entitled the "Ladies' Directory," and his avowed object was to assist prostitutes to ply their trade when, as a result of the Street Offences Act, 1959, they could no longer do so by soliciting in the streets. The booklet contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures and in some cases abbreviations indicating willingness to indulge not only in ordinary sexual intercourse, but also in various perverse practices. From the prostitutes whom he canvassed and advertised the appellant received fees ranging from two guineas for quarter-page advertisements without photographs to ten guineas for full page advertisements with photographs. One issue produced £250 19s. from this source. He also sold copies of the booklet to the proprietor of a sweet and cigarette shop, and weekly sales by this person started at thirty to forty and eventually reached about eighty. Prostitutes paid for advertisement out of their earnings and they or some of them obtained custom by means of the booklet.

At the trial evidence of prostitutes with regard to the meaning of the abbreviations in the booklet, and also with regard to the results of the advertisements, the ages of persons who responded to them and the practices indulged in by them was admitted. Evidence of police officers with regard to the premises indicated in the advertisements and the objects found by them therein was also admitted.

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The appeal was heard by the Court of Criminal Appeal on December 12, 13 and 14, 1960.

W. R. Rees-Davies for the appellant.
J. H. Buzzard and *Michael Worsley* for the Crown.

Cur. adv. vult.

December 21, 1960. The judgment of the court (The Lord Chief Justice, Mr. Justice Streatfeild and Mr. Justice Ashworth) was read by:

ASHWORTH J.: On September 21, 1960, the appellant was convicted at the Central Criminal Court on an indictment containing three counts alleging the following offences: (1) Conspiracy to corrupt public morals, (2) Knowingly living on the earnings of prostitution, and (3) Publishing an obscene article. The jury found him guilty on each of the three counts, and it has been submitted on his behalf that the conviction on each count should be quashed. In presenting an able argument on behalf of the appellant, Mr. Rees-Davies dealt with the counts in the opposite order to that in which they were set out in the indictment, and we think it convenient to follow the same course.

In the third count the charge was brought under section 2 (1) of the Obscene Publications Act, 1959, and the article alleged to be obscene consisted of a booklet entitled "Ladies Directory Issue No. 9." The appellant admitted publication, and his avowed object in publishing this and the two preceding issues was to assist prostitutes to ply their trade when, as a result of the Street Offences Act, 1959, they were no longer able to do so by soliciting in the streets. The booklet contained twenty-eight pages, and most of them were taken up with the names and addresses and, in some instances, photographs of women who were prostitutes. In addition, there were in some instances expressions in abbreviated form which were said to indicate that the woman in question was prepared to indulge in sadistic or masochistic conduct. For the purposes of this judgment it is unnecessary to refer to the booklet in greater detail.

On this third count Mr. Rees-Davies submitted that the learned judge failed to direct the jury that the appellant's honesty of purpose was a relevant factor for their consideration. He did not suggest that the appellant's intention or purpose was in any sense conclusive of his guilt or innocence, but he submitted that the jury should have been directed to consider it. If these proceedings had been brought before the passing of the Obscene Publications Act, 1959, in the form of a prosecution at common law for publishing an obscene libel, it would no doubt have been necessary to establish an intention to corrupt. But the Act of 1959 contains no such requirement, and the test of obscenity laid down in section 1 (1) of the Act is whether the effect of the article is such as to tend to deprave and corrupt persons who are likely to read it. In other words, obscenity depends on the article and not upon the author. Moreover, it is to be noted that section 4 of the Act which provides a defence "if it is proved that publication of the article in question is justified as being for the public good," does not refer to the purpose or intention of the publisher. Apart from this, the question of purpose was considered in HICKLIN (1868) L.R. 3 Q.B. 360, and in the course of his judgment Cockburn C.J. said at p. 370: "I think that if there be an infraction of the law the intention to break the law must be inferred and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and honest character." Secondly, on this third count, Mr. Rees-Davies submitted that evidence was wrongly admitted. Such evidence was given partly by some of the prostitutes mentioned in the booklet and partly by police officers. In so far as the prostitutes' evidence was directed to the special meaning of abbreviations and phrases used in the advertisements contained in the booklet, we are

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of opinion that it was plainly admissible. The abbreviation "Corr.," for example, has apparently a well-known meaning to prostitutes and those who resort to them as indicating sadism and evidence to this effect was admissible to explain to a jury, who would probably be unaware of it, what the words would convey to many who were likely to read it. But the prostitutes' evidence went further and included evidence as to the result of advertisements, the ages of persons resorting to them, and the practices in which they indulged. The police evidence described the premises of some of the advertisers in the booklet and the objects which were found there. In our view, except to the extent already indicated, the prostitutes' evidence and that of police officers was not admissible upon this third count in which the only issue was the question whether the article was obscene. On the other hand, as was conceded by Mr. Rees-Davies, such evidence was plainly admissible on the first count alleging conspiracy and, accordingly, the only complaint that could be made was that the jury should have been directed to disregard such evidence when considering the third count. No such direction was given, but it is only right to say that no objection to the evidence was taken at the trial by counsel then appearing for the appellant, nor was the learned judge invited to give any such direction or to order a separate trial of the third count. Notwithstanding the force of the submissions on this point made on behalf of the appellant, we are of opinion that there was no substantial miscarriage of justice, and that the conviction on this third count should not be set aside on this ground.

On this third count, it was further submitted that in the course of his summing-up the learned judge wrongly directed the jury to have regard to what persons did after reading the article, in considering whether it was obscene within the meaning of the Act. It is true that there are words in one paragraph which may be said to justify this submission, but these words must be read in their context, and, in our view, they were explanatory of the words preceding them and should not be regarded as a direction to the jury to consider what happened afterwards as a test of the article's obscenity. Lastly, an argument was put forward that inasmuch as the persons likely to read the article were persons who had come to areas of prostitution, such as Soho and Paddington, and were seeking opportunity to indulge in the practices advertised in the booklet, they were already corrupt and depraved. The fallacy in this argument is that it assumes that a man cannot be corrupted more than once, and there is no warrant for this.

The second count is the next to be considered. The main argument of Mr. Rees-Davies was based upon an alleged distinction between a person who supplies services for reward to a prostitute and a person who merely received a prostitute's earnings. He pointed out that the offence which is now to be found in section 30 of the Sexual Offences Act, 1956, was previously to be found in the Vagrancy Act, 1898, as amended by the Criminal Law Amendment Act, 1912. It might, therefore, be inferred that the type of person against whom the Acts were directed was someone who could properly be regarded as a rogue or a vagabond and was not someone who pursued a trade or calling of his own and happened to take money from a prostitute for goods or services supplied to her. In our view, it is not open to this court to take so restricted a view of section 30 of the Act of 1956, having regard to the decision of this court in THOMAS (1957) 41 Cr.App.R. 121; [1957] 1 W.L.R. 747; [1957] 2 All E.R. 181. In that case proceedings were brought under the Vagrancy Act, 1898, and the amending Act of 1912, and the accused was a man who, knowing a woman to be a convicted prostitute, agreed to let her have the use of a room between the hours of 9 p.m. and 2 a.m., charging her £3 a night for the accommodation. At the Central Criminal Court, Pilcher J. had declined to follow a ruling of Judge Maude in SILVER (1956) 40 Cr.App.R. 32, [1956] 1 W.L.R. 281; [1956] 1 All E.R. 716, and held that " if there is evidence that the accused has let a room or flat at a grossly inflated rent to a prostitute for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution": [1957] 2 All E.R. at pp. 182–183. The accused was convicted, and his application for leave to appeal was refused by this court. The judgment of the court contains express approval of Pilcher J.'s direction and disapproval of the contrary ruling of Judge Maude. In our view, the principle of THOMAS's case (*supra*) is equally applicable in a case such as the one now before us. If a man knowingly assists a prostitute with the direct object of enabling her to carry on her trade and knowingly lives wholly or in part on the earnings of the prostitution which he assists, he is in our opinion guilty of an offence under section 30 of the Act of 1956.

It was further submitted that there was no evidence that the appellant charged inflated prices for the prostitutes' advertisements, and therefore that THOMAS's case (*supra*) was distinguishable. This submission is not well founded and involves a misunderstanding of the relevance of the inflated rent in that case. The purpose of tendering evidence as to the rent was to show that the room was not let for normal accommodation, but for the prostitute's professional purposes, and although, in the absence of such evidence or other evidence implicating the accused, it might be difficult to prove the charge in the case of a room being let to a prostitute, such evidence was not, in our view, an essential element in the prosecution's case.

Lastly, on the second count, it was submitted that the appellant did not receive the prostitute's earnings but merely profits arising from the sale of the booklet after all expenses had been met. This submission involves much too narrow a view of the facts. There would have been no profits at all but for the advertisements and the income derived by the appellant from the venture (which he admitted was considerable) was manifestly in essence the money paid by the

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prostitutes. Accordingly, there is in our view no reason to set aside the conviction on the second count.

The first count, with which we now deal, raises in some ways a more difficult problem. The charge was one of conspiracy, and it is convenient to set out the relevant portion of the indictment:—" Statement of Offence: Conspiracy to corrupt public morals. Particulars of Offence: [The appellant], on divers days between the 1st day of October, 1959, and the 23rd day of July, 1960, within the jurisdiction of the Central Criminal Court, conspired with certain persons who inserted advertisements in issues of a magazine entitled ' Ladies Directory ' numbered 7, 7 revised, 8, 9, 10 and a supplement thereto, and with certain other persons whose names are unknown, by means of the said magazine and the said advertisements to induce readers thereof to resort to the said advertisers for the purposes of fornication and of taking part in or witnessing other disgusting and immoral acts and exhibitions, with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen and to raise and create in their minds inordinate and lustful desires." Conspiracy is an offence which takes many different forms, but in the present appeal the matter was greatly simplified when Mr. Buzzard on behalf of the prosecution made it clear that the form of conspiracy which he had alleged at the trial and to which he adhered, was a conspiracy to commit an unlawful act, and not a conspiracy to commit a lawful act by unlawful means. He reserved the right to contend, should it be necessary, that a conspiracy to corrupt the morals of a particular individual was an indictable offence by reason of the conspiracy even if such corruption if done by one person would not be an offence. The unlawful act which he alleged was said to be a common law misdemeanour, namely, the corruption of public morals. His proposition was twofold: At common law any act calculated or intended to corrupt the morals of the public or a portion thereof in general, as opposed to the morals of a particular individual or individuals, is indictable as a substantive offence. Secondly, an act calculated or intended to outrage public decency is also indictable as a substantive offence. Both parts of this proposition were naturally contested by Mr. Rees-Davies, and the main issue before us on this first count is whether the first of Mr. Buzzard's propositions is well founded.

We were referred to a large number of cases, but before alluding to any of them in detail we may usefully refer to the speech of Lord Sumner in BOWMAN *v.* SECULAR SOCIETY [1917] A.C. 406, at pp. 456 *et seq.*, in which is set out an illuminating survey of this branch of the law from the beginning of the seventeenth century. At the foot of p. 456 he says: "The time of Charles II was one of notorious laxity both in faith and morals and for a time it seemed as if the old safeguards were in abeyance or had been swept away. Immorality and irreligion were cognizable in the Ecclesiastical Courts but spiritual censures had lost their sting and those civil courts were extinct which had specially dealt with such matters viewed as offences against civil order. The Court of King's Bench stepped in to fill the gap."

The first reported occasion on which the Court of King's Bench thus stepped in appears to be SIDLEY (1663) 1 Sid. 168. Amongst other acts alleged against Sir Charles Sidley were his exposure of his naked body upon a balcony in Covent Garden before a large gathering of people and making water on the persons below. In addition he was said to have thrown down bottles upon such persons' heads. This latter conduct was plainly within the jurisdiction of the Court of King's Bench, but there was evidently an issue whether the other conduct was such as could be dealt with in that court. In the short report of the case there appears the statement that "This court is *custos morum* of all the King's subjects and that it is high time to punish such profane conduct." In 1708 in READ, Fort. 98, the court expressed a different view when considering a charge of publishing an obscene libel, but the judgment in the defendant's favour was only a "judgment nisi," that is, a provisional judgment. Not long afterwards the case of CURL (1727) 2 Str. 788, came before the Court of King's Bench, in which the charge against the accused was that of publishing an obscene libel. Reliance was naturally placed upon READ'S case (*supra*) by defending counsel, but the Attorney-General's argument to the contrary (set out at pp. 789–790 of the report) prevailed: "What I insist upon is this, that this is an offence at common law as it tends to corrupt the morals of the King's subjects and is against the peace of the King . . . I do not insist that every immoral act is indictable, such as telling a lie, or the like; but if it is destructive of morality in general, if it does or may affect all the King's subjects, then it is an offence of a public nature." The Lord Chief Justice in giving judgment said: "If it reflects on religion, virtue or morality, if it tends to disturb the civil order of society, I think it is a temporal offence." After the case had been adjourned the court "gave it as their unanimous opinion that this was a temporal offence. They said it was plain that the force used in SIDLEY'S case (*supra*) was but a small ingredient in the judgment of the court who fined him £2,000. And if the force was all they went upon, there was no occasion to talk of the court's being *censor morum* of the King's subjects. They said that if READ'S case (*supra*) was to be adjudged, they should rule it otherwise: and therefore in this case they gave judgment for the King." In 1875, in SAUNDERS AND HITCHCOCK, 13 Cox 116, the main issue seems to have been whether a booth on Epsom Downs was a public place, but the decision is of importance as confirmation of the existence of a common law misdemeanour if conduct takes place which openly outrages decency and is injurious to public morality. Similarly, in WELLARD (1884) 14 Q.B.D. 63; 15 Cox 559, Grove J. said (15 Cox at p. 563): "I am of opinion that this case comes within the ordinary and reasonable meaning of the principle which makes it a misdemeanour to outrage public decency and morality." Huddleston B. said on the same page: "The principle is well established, which is laid down in *Blackstone* and in Hawkins' *Pleas of the Crown*, namely, that whatever openly outrages decency and is injurious to public morals is a common nuisance and indictable as a misdemeanour at common law."

Lastly, in 1927, BERG AND OTHERS came before this court: 20 Cr.App.R. 38. This court has seen the original indictment in that case. It contains two counts, the second of which alleged a conspiracy to corrupt public morals, and it is significant that all the accused named in that count pleaded guilty to it. The issues raised in the appeal related only to the first count, which charged the accused with keeping a disorderly house, but in our view it is impossible to suppose, having regard to the eminence of the counsel engaged in the case, that if the charge in the second count alleged an offence unknown to the law, the indictment would have been drafted in that way, that the prisoners would have been allowed to plead guilty or that the point would not have been taken by the court itself, presided over by Avory J. In the course of their arguments before us counsel on both sides referred to a well-known textbook published in 1873, *Law of Criminal Conspiracies and Agreements*, by R. S. Wright (as he then was). We do not think it necessary to lengthen this judgment by discussing the points arising out of the learned author's comments on some of the cases already cited or to decide to what extent they are open to question.

In our opinion, having regard to the long line of cases to which we have been referred, it is an established principle of common law that conduct calculated or intended to corrupt public morals (as opposed to the morals of a particular individual) is an indictable misdemeanour. As the reports show, the conduct to which that principle is applicable may vary considerably, but the principle itself does not, and in our view the facts of the present case fall plainly within it.

The contrary view put forward by Mr. Rees-Davies may be summarised as follows: He accepted for the purposes of his argument the claim of the Court of King's Bench to be *custos* *morum*, but he contended that, acting in that role, the court had, so to speak, from time to time declared particular conduct to be an offence, thereby creating an offence rather than applying existing law to the particular facts. He went on to contend that Parliament in the last one hundred years had concerned itself with legislation on issues of morality, decency and the like, that such legislation must be taken to be in effect a comprehensive code, and that there is no longer any occasion for the courts to create new offences in its capacity as *custos morum*. We are unable to agree with this argument, which fails to give sufficient weight to the repeated statements of the established principle of common law to which we have already referred. The courts in the relevant cases were not creating new offences or making new law; they were applying existing law to new facts. It is perhaps worth adding that the principle itself is not in any way affected or qualified by the fact that in the course of time public opinion as expressed in juries' verdicts may change in regard to matters of public decency and morality. This was emphasised by Lord Sumner in BOWMAN *v.* SECULAR SOCIETY [1917] A.C. at p. 467: "The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all, the question whether a given opinion is a danger to society is a question of the times and is a question of fact."

Support for the proposition expressly reserved by Mr. Buzzard on behalf of the prosecution, relating to a conspiracy to corrupt the morals of a particular individual, is to be found in a number of cases, from two of which we take the following extracts: In DELAVAL (1763) 3 Burr. 1434, Lord Mansfield said at p. 1438: "It is true that many cases of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court and are appropriated to it. But if you except those appropriated cases this court is the *custos morum* of the people and has the superintendency of offences *contra bonos mores* and upon this ground both Sir Charles Sidley and Curl, who had been guilty of offences against good manners, were prosecuted here. However, besides this, there is in the present case a conspiracy and confederacy amongst the defendants which are clearly and indisputably within the proper jurisdiction of this court." Lord Campbell in Volume 3 of his *Lives of the Chief Justices* refers to this case and after quoting the words already cited he adds the following passage from Holliday, 214, which evidently formed part of the judgment: "If Sir Francis Delaval had merely seduced this unfortunate girl by his own solicitations, he might only have been liable to an action for damages at the suit of her father: but entering into a wicked bargain by which he purchased her from another, the two must be considered as conspiring to ruin her and they are both guilty of a misdemeanour."

Secondly, in MEARS AND CHALK (1851) 2 Den. 79; 4 Cox, 423, the two accused were indicted in three counts for conspiring to procure by false pretences a girl to have illicit carnal connection with a man. In giving judgment Jervis C.J. said (4 Cox at p. 427): "It is unnecessary to discuss the first and second counts and upon them we give no opinion because we all think that the third is a good count; the court being clearly of opinion that a conspiracy to solicit prostitution being against good morals and public decency is, independently of the statute, an indictable offence." Another illustration is afforded by HOWELL (1864) 4 F. & F. 160. It is also to be noted that in CROFTER HAND WOVEN HARRIS TWEED CO. *v.* VEITCH [1942] A.C. 435, the Lord Chancellor, Viscount Simon, evidently had this class of case in mind, although he did not find it necessary to deal with it. At p. 439 he said: "I am omitting consideration of those cases on the borderland of illegality, where the combination was held to amount to a criminal conspiracy because the purpose aimed at, though not perhaps specifically illegal, was one which would undermine principles of commercial or moral conduct."

In the present case the issue involved in this third count was fully argued in the absence of the jury, and the learned judge's ruling was in the following terms: "In my opinion a conspiracy to debauch and corrupt public morals is a common law misdemeanour and is indictable at common law." We agree with this ruling. If the principle to which we have referred is part of the common law of this country, it must follow that a conspiracy of the type alleged is an indictable offence.

There are passages in the summing-up on this issue which Mr. Rees-Davies criticised, but we do not find it necessary to deal with them in detail. In our view, the learned judge took great care to summarise the arguments put forward by the prosecution and the defence respectively, and he made it clear to the jury that it was their task, using their common sense, to decide whether a conspiracy to corrupt was in fact established. In our view, there is no substance in the criticism of the summing-up on this count.

A quite separate ground of appeal in regard to the first count was put forward in reliance on section 2 (4) of the Obscene Publications Act, 1959, which provides: "(4) A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene." It was argued that the object of this subsection is to prevent proceedings at common law based upon an obscene article (especially when proceedings are also taken under the Act itself) and that in the present case the reference in the first count to the booklet shows that the proceedings on that count were based upon an obscene article. In our view, the short answer to this argument is that the offence at common law, namely, conspiracy to corrupt public morals, did not "consist of the publication" of the booklets. The common law offence alleged by the prosecution consisted of the agreement of the appellant and others to corrupt public morals by means of the booklets, and although it is unlikely that if the appellant had been acquitted on the third count he would have been convicted on the first, the two counts involved different issues and the verdict on each need not necessarily have been the same. In our view, the primary object of subsection (4) was to exclude proceedings at common law for the common law offence of publishing an obscene libel. The offence has not been abolished by the Act of 1959, although as a result of the subsection proceedings in respect of it can no longer be brought.

For these reasons, there is in our view no ground for setting aside the conviction on any of the three counts, and the appeal against conviction is dismissed.

By leave of the court, the appellant also appealed against the sentence of nine months' imprisonment concurrent on each count, which the learned judge imposed. We see no ground for interfering with what was in some respects a light sentence which would have been appropriate on any one of the counts standing by itself. The appeal against sentence is also dismissed.

Appeal dismissed.

(*Following a discussion on the question of leave to appeal to the House of Lords*):

[THE LORD CHIEF JUSTICE said: the court has come to the conclusion that in regard to count 1 they will certify that a point of law of general public importance is involved in the decision, and they give leave to appeal to the House of Lords. With regard to count 2 the court similarly certify and grant leave. With regard to count 3 the court is not satisfied that there is involved in the decision a point of law of general public importance.]

The House of Lords heard the appeal on March 13, 14, 15, 16, 20, 21 and 22, 1961.

W. R. Rees-Davies, for the appellant. The trial judge directed the jury that, if the appellant was living on the profits of the magazine and the profits came wholly or in part from payments for advertisements in the magazine, and that fact was within the knowledge of the appellant, they would have very little difficulty in finding the offence proved. The Court of Criminal Appeal approved that direction, and held that it was bound by the decision in THOMAS (1957) 41 Cr.App.R. 121; [1957] 1 W.L.R. 747. In the submission of the appellant, that decision was wrong. It involved a misunderstanding of the proper construction of section 1 of the Vagrancy Act, 1898, as amended by section 7 of the Criminal Law (Amendment) Act, 1912, the Act from which section 30 of the Sexual Offences Act, 1956, is derived. The Act was not an Act dealing with public morals. It was designed to give the police power to enter a house where a man who was an idle and disorderly person within the meaning of the Vagrancy Act, 1824, and who was living on the earnings of women of the streets, cohabited with a prostitute or where he was known to frequent. Apart from the decision referred to, there has been no reported case on the meaning of the words "living wholly or in part on the earnings of prostitution." It had never hitherto been suggested that a landlord or person who by way of trade rendered services to prostitutes came within the subsection. It is submitted that in the present case the appellant, who was a publisher, was living on his own earnings in respect of the money obtained from the advertisements. At least, it was essential that the jury should receive a full direction on the meaning of the words, and in the present case they received no such direction. [LORD REID: "Lives on" might suggest "lives parasitically," that is to say, gets money which the person charged has done nothing to earn.] For the purpose of this argument, such a definition would readily be accepted. The Court of Criminal Appeal held that, if a man assisted the trade of a prostitute and received earnings which came from prostitutes, that would be sufficient to bring him within the section. That cannot, it is submitted, be correct. It is common knowledge that prostitutes require many services, including those of a lawyer and a doctor. The heart of the issue is whether a person can properly provide a normal service to a prostitute. [LORD TUCKER: Is your proposition that, provided the defendant is in fact rendering a service of one kind or another to a prostitute, that is the end of the case, if the money received is for services rendered?] The proposition goes a little further than that. The proper direction to the jury would be that they should consider whether the defendant was providing services in the proper sense of the word, so that they could say that he was not an idle and disorderly person living on the earnings of prostitution, but a person following a genuine occupation of his own. [LORD TUCKER: Would it be irrelevant that the services were such as to encourage prostitution as a whole?] Yes, provided they were bona fide services. [LORD HODSON: Does nothing turn on the nature of the services?] No, unless the service is in itself unlawful or criminal. Here the appellant was engaged in the ordinary work of a publisher. The Act under which the prosecution was brought was aimed not at morals or the undesirability of exorbitant charges being made to prostitutes, but with public order on the streets. [LORD REID: You say that if the work is not in connection with prostitution it does not count, so that a defendant escapes from the section by proving that he has an honest job for which he is paid ordinary wages?] Yes. One comes back to the question whether the words "living on" are to be construed broadly or in the sense of being a parasite. [LORD SIMONDS: An exorbitant charge would appear to be relevant only to the issue of knowledge that premises were intended to be used for prostitution.] There was no evidence of any exorbitant charge in the present case, and the jury should have been reminded that the appellant pursued the trade of a publisher who made the same charges for all his advertisements. The Act should be construed strictly in view of obvious dangers which might arise and any ambiguity there may be should be resolved in favour of the subject. It would be wrong for courts to try to assist the legislature by using old

Acts in a manner in which they had never been used before in an endeavour to meet new problems which have arisen. The correct verb to explain what was meant by " living on " within section 30 of the Act of 1956 was " preying on," and a proper direction to the jury would draw a clear dividing line between the ponce or pimp, who was within the mischief of the Act, and a person fairly to be regarded as pursuing a real occupation of his own.

The second ground of appeal, relating to the conviction of conspiracy to corrupt public morals, raises singularly difficult questions. The contention of the Crown was that corruption of public morals is a misdemeanour known to the law and that if a number of persons agreed together to have recourse to prostitutes they were guilty of that misdemeanour. It was alleged that the publisher and advertiser had conspired to corrupt public morals by (i) encouraging fornication with prostitutes and (ii) producing a magazine which would arouse inordinate and lustful desires in the minds of its readers. It is submitted on behalf of the appellant that there is no such offence known to the law and that indictment was, therefore, invalid. That submission is based on the construction of section 2 (4) of the Obscene Publications Act, 1959. That subsection means precisely what it says, that a person publishing an article of the kind forbidden by the subsection should not be proceeded against for an offence at common law. The evidence and facts material to the count for conspiracy in the present case were identical to those material to the count for an offence against the Act of 1959, which is not before this House. The reason why the count of conspiracy was introduced was because the Crown had only one booklet on which to base the charge of obscene libel. [LORD SIMONDS: May not a magazine such as *The Ladies' Directory* be both an obscene libel and a conspiracy to corrupt public morals?] It is precluded from being so by section 2 (4) of the Act of 1959. " Obscene " in the Act means tending to deprave or corrupt. Even if such a misdemeanour as corruption of public morals does exist at common law, it is limited to offences outraging public decency, which fall within the realm of the separate misdemeanour of public nuisance. In the present case there was no evidence of outrage of public decency, no public display and no indecent advertisement. In the present day the courts rarely, if ever, concern themselves with private morals or private immoral assignments. All offences relating to immorality, including obscene libel, have now been incorporated into statute law. In the present case the trial judge's direction on this issue was very brief. He merely asked the jury whether they were satisfied that the necessary result of inducing readers to have recourse to prostitutes for fornication, etc., was to " lead them morally astray." There was no definition of the word " corrupt." If the offence of conspiracy to corrupt public morals really exists, it is surprising that there has been no indictment for it within the last 100 years, with the sole exception of Berg and Others (1927) 20 Cr.App.R. 38, where as as there had been a plea of Guilty, the issue could not have been contested or argued. Statements in old cases on the question of public morals, pungent though they may be, were merely *obiter*. [He referred to Webb (1848) 1 Den. 338; Watson (1847) 2 Cox 376; Harris (1871) L.R. 1 C.C.R. 282; Wellard (1884) 14 Q.B.D. 63; 15 Cox 559; Reed (1871) 12 Cox 1; Saunders and Hitchcock (1875) 1 Q.B.D. 15; Grey (1864) 4 F. & F. 73.]

[Lord Reid: Would it be fair to say that in earlier centuries there was a genus in the course of being increased, which could be described as " disturbing the civil order of society," but for the last 200 years only one species of that genus, obscene libel, has survived, and that it is now too late to raise up another species, even though it would have fallen within the original genus?] That view of the law is accepted for the purpose of this argument. In contending that an agreement between two or more persons that there should be assignments with a prostitute for the purpose of fornication amounts to a conspiracy of the kind charged in this case, the Crown would first have to establish that the assignments were sufficient to constitute a misdemeanour of the corruption of public morals, which would not be the case, because it would presuppose that prostitution itself was unlawful in the strictest sense of the word. PEIRSON (1705) 2 Ld. Raym. 1197, which is still good law, is an authority for the proposition that solicitation of chastity *per se* is not and never has been considered an offence. That case was not cited in the Court of Criminal Appeal. Cases on the law of blasphemy, and in particular BOWMAN *v.* SECULAR SOCIETY [1917] A.C. 406, are relevant in the present proceedings. A mere attack on the principles or doctrines of Christianity is not in itself an offence at common law. There must be the additional element of profanity and indecency, so that the offence amounts to shocking and disgusting conduct in the face of the people. If, therefore, there is said to be a class of offences described as outraging public decency which can form the basis of a conspiracy to corrupt public morals, "public morality" or any similar phrase should be construed *ejusdem generis* with outrage of public decency and as connoting something in the nature of a public nuisance. The textbooks support the submission that, if the present indictment creates a new offence or involves an extension of existing criminal law, the House should lean against such creation or extension. There is, admittedly, a group of cases dealing with conspiracy to ruin young girls, which may amount to a tort or a crime. [He referred to GREY (LORD) (1682) 9 St.Tr. 127; HOWELL (1864) 4 F. & F. 160; MEARS AND CHALK (1851) 2 Den. 79; 4 Cox 423; DELAVAL (1763) 3 Burr. 1434.] Such cases are far removed from the present case, and to contend that the conspiracy alleged in the present case fell under the general heading of conspiracies to do a lawful act by unlawful means would be an unjustifiable extension of the existing law. Prostitution is not unlawful, except in the sense that the courts will not enforce contracts for reward based on prostitution. It has never been held to be unlawful to indulge in fornication or to persuade others to do so. There were, therefore, no unlawful means used in the present case, and to advertise prostitution, though it may be unpleasant and distasteful, is not unlawful in the accepted sense of the word. In the field of criminal law the courts have concerned themselves only with the upholding of the Queen's peace and the maintenance of public law and order. [LORD SIMONDS: Lord Mansfield would not have agreed with that. He would have said that the Court of King's Bench could intervene as *custos morum.*]

Philip S. C. Lewis, following for the appellant. If the offence of corrupting public morals exists and if its essence is the danger to society involved, there cannot be said in the present case to have been such corruption as would break the fabric of society.

The Solicitor-General (*Sir Jocelyn Simon*, Q.C.), for the Crown. It is important to remember that the offence charged in the present case was an offence under section 30 of the Sexual Offences Act, 1956, and it does not assist in the construction of that section, nor would a jury be assisted, by a consideration of the fact that a corresponding provision was originally found in a Vagrancy Act. It is irrelevant to import considerations of roguery, vagabondage and offences committed in a public place, and vagrancy offences were not, in any event, limited to such offences. A man may now undoubtedly live on the earnings of prostitution, knowingly, wholly or in part, without living with the prostitute or exercising control over her. The words under consideration are living "on the earnings of prostitution" and not "of a prostitute," and mean subsisting in the connotation of livelihood or an occupation. The element of parasitism is comparatively slight, though it will arise in some cases. A person lives on the earnings of prostitution if he derives money or money's worth from it, and it is no answer to say "I am living on my own earnings for the services I render" or, in the present case to say "I am living on my earnings as a publisher." The nature of the matter published is extremely important. At one end of the scale on this branch of the law there is the plain case of services such as those rendered in the present case; at the other end are persons who render services to a prostitute not *qua* prostitute but as a member of the public, such as a baker, doctor or barrister. In these cases, though the person rendering the services knows that the recipient is a prostitute and that he will be paid out of the earnings of prostitution, the service is not rendered by him to the prostitute *qua* prostitute. Between these lies an intermediate class, where the services are equivocal, such as letting a room or hiring a car to a prostitute. The services rendered in the present case were directly for the promotion of prostitution and clearly fell within the first class. [LORD TUCKER: Directly providing and directly intending to do so?] Yes. There cannot be any distinction in principle between the man who stands at the corner of the street and offers to conduct passers-by to a prostitute and the man who advertises the addresses of prostitutes. [LORD MORRIS OF BORTH-Y-GEST: Why should the offence be confined to men and not include women?] It is hard to say, unless it be by reason of the fact that hitherto the persons who have mainly engaged in economic activities have been men. The test might be put, within reasonably narrow compass, by asking the question: was the service rendered to the prostitute *qua* prostitute and so intended? or, alternatively, was the service calculated or designed to promote prostitution and did the person rendering it receive a reward in money? [LORD SIMONDS: It must be a service which would not be rendered to her unless she were a prostitute and for the purposes of prostitution, and an advertisement of her as a prostitute is as good an example as you can get.] Yes, and there is the further advantage that such a test would coincide with the civil law on this subject. [LORD SIMONDS: I think you need to add some words which convey the idea of "directly *qua* prostitute and not *qua* human being."] [LORD TUCKER: Might not the difficulty arise in the case of a landlord, because so much could depend on the rent?]

An exorbitant rent is relevant in two respects: first, to establish knowledge on the part of the defendant that he was living on the earnings of prostitution, and secondly, to establish the purpose for which the service was rendered. The importance of an exorbitant charge really arises in the equivocal cases. There may be borderline cases, but that fact would not invalidate the test. In the present case the question of excessive charge does not arise, for the services were unequivocally related to the promotion of prostitution and it would be no answer for the appellant to say " I am charging no more than is reasonable for the services rendered."

With regard to the conspiracy charge, there was on the evidence a conspiracy to introduce persons to perversions as well as fornication. It is submitted, in the first place, that conduct calculated and intended to corrupt the morals of the public or a portion thereof in general, as distinct from a particular individual or individuals, is indictable as a substantive offence, and secondly, conduct calculated and intended to outrage public decency is also so indictable. There is a steady consensus of assent for these propositions by the institutional and textbook writers. [He referred to Hawkins' *Pleas of the Crown*, Vol. I, p. 358; Blackstone's *Commentaries*, Book IV, p. 72; East's *Pleas of the Crown*, Vol. I, p. 3 and Chitty's *Criminal Law*, Vol. II, pp. 35 *et seq.* and the indictments set out therein.] [LORD TUCKER: I am puzzled about the verbiage of those ancient indictments. Was it necessary to prove all the various averments, or were these merely words of description of the act itself?] The intent in every case was to corrupt public morals. The conduct had to be witnessed by someone, but need not have occurred in a public place. [LORD TUCKER: Why does not the mere act of fornication come within the general statements in the authorities?] Because it is not done openly. If it were done in a public place, the position would be different. [LORD TUCKER: Then the public element is vital?] It may be important in considering whether the act is calculated and intended to corrupt the morals of society.

[LORD TUCKER: Is it a conspiracy, if two persons give to a third the address of a prostitute, knowing the purpose for which it is given? And if the third person was willing and anxious recipient of the information, is the agreement to give that information an indictable conspiracy?] It is a conspiracy to corrupt the morals of an individual and leaves open the question posed by the Court of Criminal Appeal and accepted by them that a person can be corrupted more than once. From 1663 onwards there is a line of cases supporting the proposition that there is an offence consisting in conduct calculated or intended to corrupt public morals or outrage public decency, and conspiring to do either of these things is indictable. [He referred to SIDLEY (1663) 1 Sid. 168; READ (1708) Fort. 98; and CURL (1727) 2 Str. 788, which was an indictment for obscene libel.] So far as obscene libel is concerned, CURL's case (*supra*) is good law, and the essence of the offence is the corruption of public morals. [LORD SIMONDS: Do you say that it is always a common law misdemeanour to do something which tends to corrupt public morals, but that the question what will corrupt public morals changes from century to century?] That is precisely what I was venturing to submit. It is the Crown's submission that one act which corrupts the chastity of a woman would be corruption, and so would be an act of perversion. The cases so far cited show these manifestations of the fundamental class of offence: indecent exposure, obscene libel and obscene conduct. Publication, whether of words or conduct, to one person is immaterial, but if it is designed and directed *seriatim* at members of the public, an offence is established. [LORD SIMONDS: Your real problem is whether in the present day a new species of this broad genus of crime is permissible.] The cases establish that the genus is a live one and the general principle underlying them may be applied to new circumstances and new manifestations. If conduct designed, intended and calculated to corrupt public morals is an indictable offence, there clearly can be conspiracy to corrupt public morals. Alternatively,

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whether or not such conduct amounts to a criminal offence, such a conspiracy is indictable as a conspiracy to commit a wrongful act calculated to cause public injury. He referred to Grey (Lord) (*supra*); Howell (*supra*); Delaval (*supra*); Mears and Chalk (*supra*) and Crofter Hand Woven Harris Tweed Co. *v.* Veitch [1942] A.C. 435, *per* Lord Simon at p. 439. [Lord Reid: Are you trying to persuade me that in Pearce *v.* Brooks (1866) L.R. 1 Ex. 213, where nothing could be more calculated to cause public injury than the display of a prostitute in a brougham in apparently wealthy surroundings in a public street, those who agreed to supply the brougham could have been prosecuted for a criminal offence?] That would be a question for the jury. [Lord Tucker: I thought all conspiracies had to be conspiracies to bring about an unlawful end or to bring about a lawful end by unlawful means. Are you not now putting forward a new species?] No, the end is still unlawful, even if not strictly illegal. [Lord Simonds: Is there any case which shows the offence as being a conspiracy and not the act which the conspiracy agrees to do?] The Crown relies on the dictum of Lord Simon in the Crofter case (*supra*) and Delaval (*supra*). [Lord Morris of Borth-y-Gest: Is there such an offence as corrupting the morals of an individual?] That becomes an offence only in the case of conspiracy. [Lord Tucker: You say that in this case there is a public element in the distribution of the pamphlets to anyone willing to buy them for the purpose of going, not to one particular address, but to a number of different addresses for prostitution. Is not that a sufficient element of corruption of morals?] Yes, but the matter is put forward in the alternative, because there is clear authority that it is sufficient if the conduct is directed against the morals of one individual. With regard to the words of section 2 (4) of the Act of 1959 "shall not be proceeded against for an offence at common law," the offence at common law there contemplated was the publication of any matter contained in the article. In the present case the offence charged consisted of the agreement, not to publish any matter, but to induce readers to resort to prostitutes. It was not the essence of the offence that the matter was obscene. On a charge of conspiracy, a substantive intent has to be proved, whereas under the Act the test of obscenity is purely objective and section 4 provides the special defence that the publication is for the public good. The great difference since the Act of 1959 is that the offence of obscene libel does not involve any mental element, whereas in conspiracy the mental element is of the essence of the offence. There is a great advantage in still being able to charge conspiracy, because some of the conspirators may have had nothing to do with the implementation of the agreement. [LORD TUCKER: Do you say that the trial judge's direction on the meaning of "deprave and corrupt" was sufficient? Was it not necessary to give a very careful direction to a jury which was being invited to break fresh ground, should not their attention have been drawn to some of the pamphlets which suggested unnatural practices, so that they could consider whether that factor turned the scale?] It was neither necessary nor desirable to tell the jury that this kind of offence had not been charged before, and they were given assistance on the meaning of "deprave and corrupt."

J. H. Buzzard, following for the Crown. I accept complete responsibility for the introduction of the count charging conspiracy. That course was adopted, because this was the first prosecution under the Act of 1959. Though the Crown would have been prepared to submit that the magazine was an obscene publication within the Act, it was very different from the ordinary case of obscene libel, for on its face it did not immediately conjure up impure thoughts and it might have been difficult to persuade a jury that it did constitute an obscene libel. Further, under the Act no proof of intent is required in the case of obscene libel and the punishment is limited, whereas on the graver charge of conspiracy the punishment is at large.

Michael Worsley also appeared for the Crown.

W. R. Rees-Davies, in reply. No Act of Parliament has ever aimed at putting the prostitute out of business and she is still permitted to ply her trade. The Sexual Offences Act, 1956, was not aimed at preventing the practice of prostitution. [LORD SIMONDS: Is it your case that, if a man renders a service of any kind to a prostitute and is paid for it, it does not matter what the service is or how exorbitant is the payment?] The Act provides that a man cannot live on a prostitute by protecting her. If he preys on or battens on her earnings, then he does "live on" her. "Services" as such do not come within the Act at all. The Act is not aimed against the trade of prostitution, and therefore a prostitute must be permitted the ordinary services of a trade—a habitation, which may be a private house, or a flat or room occupied by her, actual working goods, medical advice, advertising, transport and lastly the introduction bureau, which is perhaps the hardest class of case to decide. It is submitted that the porter or manager of an hotel, or the manager of a club or night club who may receive a tip from a prostitute, is not living on her unless it can be said that he is preying on her. If the manager of a night club ran the premises for nothing else but prostitution, there might be evidence to leave to the jury. In the present case there was no adequate direction on the meaning of the words "lives on" and no proper evidence to leave to the jury. If the House gives the words too wide an interpretation, the criminal law may lose the essential quality of certainty.

With regard to the argument on the conspiracy charge, it is submitted that this was a case of obscene libel. That is the only genus which has come within the field of corrupting public morals. Under the law of today no prosecution can be brought in respect of a publication except under the Obscene Publications Act, 1959. Since that Act the genus has been completely exhausted and the control of public morals is not a matter for the courts, but for Parliament. With regard to the propositions on public morals to be found in the cases, the judges, while they paid lip-service to the idea or liked to think through the centuries that they were the custodians of public morals, have not really dealt with the field of morals, which has become more and more controversial as the years have passed.

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VISCOUNT SIMONDS said that the House would take time for consideration.

May 4, 1961. The following opinions were read:

VISCOUNT SIMONDS: My Lords, the appellant, Frederick Charles Shaw, was, on September 21, 1960, convicted at the Central Criminal Court on an indictment containing three counts which alleged the following offences: (1) conspiracy to corrupt public morals; (2) living on the earnings of prostitution, contrary to section 30 of the Sexual Offences Act, 1956; and (3) publishing an obscene publication, contrary to section 2 of the Obscene Publications Act, 1959. He appealed against conviction to the Court of Criminal Appeal on all three counts. His appeal was dismissed, but that court certified that points of law of general public importance were involved in the decision on the first and second counts and gave him leave to appeal on them to this House. They refused so to certify in respect of the third count. I propose, my Lords, to deal in this opinion in the first place with the second count, for I have had the privilege of reading the speech which my noble and learned friend Lord Tucker is about to deliver on the first count and so fully agree with him that I find it convenient to add some general observations which can be regarded as supplementary to what he says. My Lords, the particulars of the offence charged in the second count were that on divers days unknown between October 1, 1959, and July 23, 1960, the appellant lived wholly or in part on the earnings of prostitution. Before I refer to the statute on which the charge is based, I must refer briefly to the relevant facts.

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When the Street Offences Act, 1959, came into operation it was no longer possible for prostitutes to ply their trade by soliciting in the streets and it became necessary for them to find some other means of advertising the services that they were prepared to render. It occurred to the appellant that he could with advantage to himself assist them to this end. The device that he adopted was to publish on divers days between the dates mentioned in the Particulars of Offences a magazine or booklet which was called *Ladies' Directory*. It contained the names, addresses and telephone numbers of prostitutes with photographs of nude female figures and in some cases details which conveyed to initiates willingness to indulge not only in ordinary sexual intercourse, but also in various perverse practices. Learned counsel for the appellant made some point of the fact that the magazine contained also advertisements of models and clubs. I therefore mention it, but I do not think that it is of any importance. The profit derived by the appellant from this enterprise was two-fold. From the prostitutes whom he canvassed and advertised he received fees ranging from two guineas for quarter-page advertisements without photographs to ten guineas for full-page advertisements with photographs. There was evidence that one issue produced from this source a sum of £250 19s. Secondly, the appellant sold copies of the magazine to a Mr. Blass, the proprietor of a sweet and cigarette kiosk, and perhaps, though this is not very clear, to other persons at a price of two shillings per copy. The weekly sales of Mr. Blass were said by him to have started at thirty to forty and eventually reached about eighty. It is manifest that the appellant received substantial sums from his undertaking. It is also clear from the evidence that the prostitutes paid for advertisement out of the earnings of their profession and that they or some of them obtained custom by means of it.

It is in these circumstances that the question must be asked whether the appellant lived wholly or in part on the earnings of prostitution and I turn at once to the statute that makes it an offence to do so. That is now section 30 of the Sexual Offences Act, 1956, which is as follows: "Section 30 (1). It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution. (2) For the purposes of this section a man who lives with or is habitually in the company of a prostitute or who exercises control direction or influence over a prostitute's movements in a way which shows he is aiding or abetting or compelling her prostitution with others shall be presumed to be knowingly living on the earnings of prostition, unless he proves the contrary." This section stems from section 1 of the Vagrancy Act, 1898, as amended by section 7 of the Criminal Law Amendment Act, 1912. The earlier of these two Acts was itself an amendment of the Vagrancy Act, 1824, but I do not think that any assistance is to be derived from a consideration of its ancestry. The Act of 1824 may be regarded as a convenient peg on which to hang divers offences to which the words "vagabondage and roguery" would not be entirely appropriate. Nor do I think that subsection (2) can throw much light on the meaning of the words "lives on the earnings of prostitution" in subsection (1). It was at one time argued that the two subsections were co-extensive, but this argument was abandoned by Mr. Rees-Davies, who presented the appellant's case with candour and ability. It is, I think, clear that the second subsection is probative and explanatory of the first, but is not an exhaustive definition of it.

What, then, is meant by living in whole or in part on the earnings of prostitution? It was not contended by the Crown that these words in their context bear the very wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part upon payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy

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to deny to her the necessities or even the luxuries of life if she can pay for them. I would say, however, that, though a person who is paid for goods or services out of the earnings of prostitution does not necessarily commit an offence under the Act, yet a person does not necessarily escape from its provisions by receiving payment for the goods or services that he supplies to a prostitute. The argument that such a person lives on his own earnings, not on hers, is inconclusive. To give effect to it would be to exclude from the operation of the Act the very persons, the tout, the bully or protector, whom it was designed to catch. For they would surely claim that they served the prostitute, however despicable their service might seem to others. Somewhere the line must be drawn and I do not find it easy to draw it. It is not enough to say that here are plain English words and that it must be left to a jury to say in regard to any particular conduct whether the statutory offence has been committed. I have said enough, for instance, to show that the wider meaning of which the words are clearly capable is inadmissible. The jury should be directed that some limitation must be put upon the words. What is the limitation?

My Lords, I think that (apart from the operation of subsection (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes. I emphasise the negative part of this proposition, for I wish to distinguish beyond all misconception such a case from that in which the service supplied could be supplied to a woman whether a prostitute or not. It may be that circumstances will be equivocal, though no example readily occurs to me. But a case which is beyond all doubt is one where the service is of its nature referable to prostitution and to nothing else. No better example of this could be found than payment by a prostitute for advertisement of her readiness to prostitute

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herself. I do not doubt that a person who makes a business of accepting such advertisements for reward knowingly lives in part on the earnings of prostitution.

In one of these cases to which I shall refer a person receiving payment from a prostitute for services rendered by him is described as her coadjutor and in another as trading in prostitution. These expressions indicate the distinction that I have in mind though neither of them accurately defines a legal relation. Thus a man who advertises prostitutes and receives payment from them for doing so embarks with them on a joint venture the object of which is that they may earn money by prostitution and in turn pay him for his services. No doubt, all that he is paid is not profit, for he has the expenses of publishing. But his net reward is the direct and intended result of their prostitution. If he had no other means of livelihood, it would be truly said that he lived on their earnings: if he had other means, he would be doing so in part.

I must add a few words on the authorities that were called to our attention. In THOMAS (1957) 41 Cr.App.R. 117, 121; [1957] 1 W.L.R. 747, 1091, the accused, who was charged under the Vagrancy Act, 1898, as amended by the Act of 1912, had agreed with a woman whom he knew to be a convicted prostitute that she should have the use of a room between the hours of 9 p.m. and 2 a.m. at a charge of £3 per night. He was convicted upon a direction by Pilcher J. which was subsequently approved by the Court of Criminal Appeal. The learned judge said that "if there is evidence that the accused has let a room or a flat at a grossly inflated rent for the express purpose of allowing her to ply her immoral trade, then it is for the jury to determine on the facts of each particular case whether the accused is in fact knowingly living wholly or in part on the earnings of prostitution." The only criticism I would make of this direction is that it does not distinguish between rooms and flat and in that case it attaches undue importance to the rent being "grossly inflated," or, as is sometimes said, "exorbitant." It appears to me that, whatever the rent, the jury might have concluded that the accommodation was provided for no other purpose than prostitution and would not have been provided for her unless she was a prostitute. The exorbitance of the rent would, in my opinion, become important only if there had been evidence that this sort of accommodation was a necessity or luxury commonly required by other women for other purposes than prostitution, a thing which is not easily imaginable. In reaching this conclusion Pilcher J. had found it necessary to differ from a ruling given by Judge Maude at the Central Criminal Court in SILVER (1956) 40 Cr.App.R. 32 and in this too his decision was approved by the Court of Criminal Appeal. Judge Maude in that case held that it was not an offence for landlords and their agents to let flats to prostitutes at what were described as exorbitant rents and by the learned judge as "prostitute rents," knowing that they would be used for the purpose of prostitution. I find this is a more difficult case. If premises are let only for the purpose of prostitution and not also for occupation by the prostitute, as was the room in THOMAS (*supra*), it is easy to conclude that an offence has been committed. But, if the flat is let for occupation, I am not prepared to say that the landlord commits an offence merely because he knows that his tenant is a prostitute and must be assumed to know that she will there ply her trade. The prostitute must live somewhere just as she must eat and drink to live. It is, I think, too fine a distinction to say that a grocer supplying her with groceries does not, but a landlord letting her a flat does, commit an offence. It is true that the flat is the scene of her prostitution, but, if she did not eat and drink, she would not have a body to prostitute. Therefore in such a case as SILVER (*supra*) (where the flats appear to have been let for occupation) the landlord can only be convicted of an offence upon the ground that the rent is exorbitant. This may be a tenable view upon the footing that, to the extent to which the rent is in excess of normal, he extorts it from the prostitute upon no other ground than that she is a prostitute. He may be said, therefore, knowingly to live or, as was said in the course of the argument, to prey upon her earnings. But, as I have said, I find this a difficult case and would express no final opinion on it. A third case to which I would refer is CALVERT *v.* MAYES [1954] 1 Q.B. 342. It was, I think, a very clear case, the substantial point in which was that the accused received payment not from the prostitutes, but from the American airmen who availed themselves of their services. The argument that for this reason he did not live in part on their earnings was rightly rejected by the Divisional Court. It is interesting in that Sellers J. (as he then was) in the course of his judgment (at p. 349) referred to the accused as " trading in prostitution," an expression which, as I have already pointed out, is an apt, if colloquial, way of describing a person who lives on the earnings of prostitution. Your Lordships were also referred to some civil cases such as PEARCE *v.* BROOKS (1866) L.R. 1 Ex. 213 and UPFILL *v.* WRIGHT [1911] 1 K.B. 506. They, I think, give little assistance upon the interpretation of the relevant words in the Sexual Offences Act. But it is at least satisfactory to know that the conclusion, to which your Lordships come upon that Act, marches with the view taken in civil cases of a contract made for an immoral purpose.

My Lords, as I have already said, the first count in the indictment is " Conspiracy to corrupt public morals " and the particulars of offence will have sufficiently appeared. I am concerned only to assert what was vigorously denied by counsel for the appellant, that such an offence is known to the common law and that it was open to the jury to find on the facts of this case that the appellant was guilty of such an offence. I must say categorically that, if it were not so, Her Majesty's courts would strangely have failed in their duty as servants and guardians of the common law. Need I say, my Lords, that I am no advocate of the right of the judges to create new criminal offences ? I will repeat well-known words : " Amongst many other points of happiness and freedom which your Majesty's subjects have enjoyed there is none which they have accounted more dear and precious than this, to be guided and governed by certain rules of law which giveth both to the head and members that which of right belongeth to them and not by any arbitrary or uncertain form of government." These words are as true today as they were in the seventeenth century and command the allegiance of us all. But I am at a loss to understand how it can be said either that the law does not recognise a conspiracy to corrupt public morals or that, though there may not be an exact precedent for such a conspiracy as this case reveals, it does not fall fairly within the general words by which it is described. I do not propose to examine all the relevant authorities. That will be done by my noble and learned friend. The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed. We are perhaps more accustomed to hear this matter discussed upon the question whether such and such a transaction is contrary to public policy. At once the controversy arises. On the one hand it is said that it is not possible in the twentieth century for the court to create a new head of public policy, on the other it is said that this is but a new example of a well-established head. In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. That is the broad head (call it public policy if you wish) within which the present indictment falls. It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency, to another considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. The same act will not in all ages be regarded in the same way. The law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will, but having regard to fundamental assessments of human values and the purposes of society. Today a denial of the fundamental Christian doctrine, which in past centuries would have been regarded by the Ecclesiastical Courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed. When Lord Mansfield, speaking long after the Star Chamber had been abolished, said [in DELAVAL (1763) 3 Burr. 1434, at p. 1438] that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society. Let me take a single instance to which my noble and learned friend Lord Tucker refers. Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if, even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Paliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for Her Majesty's judges to play the part which Lord Mansfield pointed out to them.

I have so far paid little regard to the fact that the charge here is of conspiracy. But, if I have correctly described the conduct of the appellant, it is an irresistible inference that a conspiracy between him and others to do such acts is indictable. It is irrelevant to this charge that section 2 (4) of the Obscene Publications Act, 1959, might bar proceedings against him if no conspiracy were alleged. It may be thought superfluous, where that Act can be invoked, to bring a charge also of conspiracy to corrupt public morals, but I can well understand the desirability of doing so where a doubt exists whether obscenity within the meaning of the Act can be proved.

I will say a final word upon an aspect of the case which was urged by counsel. No one doubts—and I have put it in the forefront of this opinion—that certainty is a most desirable attribute of the criminal and civil law alike. Nevertheless there are matters which must ultimately depend on the opinion of a jury. In the civil law I will take an example which comes perhaps nearest to the criminal law—the tort of negligence. It is for a jury to decide not only whether the defendant has committed the act complained of, but whether in doing it he has fallen short of the standard of care which the circumstances require. Till their verdict is given it is uncertain what the law requires. The same branch of the civil law supplies another interesting analogy. For, though in the Factory Acts and the Regulations made under them the measure of care required of an employer is defined in the greatest detail, no one supposes that he may not be guilty of negligence in a manner unforeseen and unprovided for. That will be a matter for the jury to decide. There are still, as has recently been said, " unravished remnants of the common law."

So in the case of a charge of conspiracy to corrupt public morals the uncertainty that necessarily arises from the vagueness of general words can only be resolved by the opinion of twelve chosen men and women. I am content to leave it to them.

The appeal on both counts should, in my opinion, be dismissed.

LORD REID: My Lords, I agree with my noble and learned friend that the appeal on the second count ought to be dismissed, but I regret that I am unable to concur in his reasons and I feel bound to express my own view because, in my opinion, those reasons could result in cases not within the scope of the Act being brought in and cases within its scope being left out. I would begin by asking two questions: What was the mischief which Parliament must have had in mind? and: What is the natural meaning of the words "to live on the earnings of prostitution?"

The mischief is plain enough. It is well known that there were and are men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution: if they have or earn some other income, then they are living in part on such earnings. The question, to my mind, is how much further the Act must be held to go, bearing in mind that it is a penal statute and therefore should not be extended to apply to cases which its terms do not clearly cover. Such men may render services as protectors or as touts, but that cannot make any difference even if their relationship were dressed up as a contract of service. And a man could not escape because he acted in some capacity for a number of women. His occupation would still be parasitic: it would not exist if the women were not prostitutes. It appears to me that the accused in this case comes well within this class. His occupation of gathering and publishing these advertisements would not exist if his customers were not prostitutes. He was really no more than a tout using this means of bringing men to the prostitutes from whom he received money.

If this were an ordinary case, I would be content to leave it there because, if I go further, I am in effect prejudging cases which are not before us and of which the facts may be beyond the sphere of common knowledge. But I appreciate the desirability of giving some general guidance as to the meaning of this Act. So I pass to my second question, the natural meaning of the words in the Act. "Living on" normally, I think, connotes living parasitically. It could have a wider meaning but if it is to be applied at all to those who are in no sense parasites, then I think its meaning must be the same whether we are considering the earnings of prostitution or of any other occupation or trade.

If a merchant sells goods to tradesmen, is he living on the earnings of their trades? or if a landlord lets premises for business purposes, is he living on the earnings of those businesses? or if he lets to a man of leisure, is he living on that man's dividends? Those are the sources of the rent which he receives, but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words—only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is very good reason for doing so. And would it make any difference if the merchant supplied goods which could only be used for the purposes of the purchaser's trade or which he knew that the purchaser could not require if he were not engaged in that trade? I do not think so. I find it impossible to say that a merchant who sold goods to a farmer would be living on the earnings of agriculture if the goods could only be used for agriculture, but would not be living on the earnings of agriculture if the goods, though paid for out of the profits of agriculture, were for purely personal use or might be used either for agriculture or for some other purpose. Why then should the words mean something different when we are dealing with the earnings of prostitution? One reason would be that the context requires it, but I find nothing in this context to require it. Another might be that otherwise cases plainly within the mischief would escape. But even if that were a good reason I do not think that it applies here.

What kind of case would escape if one takes what I think is the natural meaning of the words? I take first the landlord. Suppose a landlord lets a flat to an apparently respectable woman and later discovers that she is carrying on prostitution there as her means of livelihood. Is he thereafter knowingly living on the earnings of prostitution? And would it make a difference if when he let it he either suspected or expected that she would use it for prostitution? We were informed that prostitutes sometimes live in one flat and use another for prostitution, and sometimes they live and carry on their trade in the same place. Is a landlord guilty in the former case, but innocent in the latter? And if in the latter case the woman decides to go somewhere else to live, does the landlord thereupon become guilty if he continues to take rent from her? I can find nothing in the words or the policy of the Act to require us to pick and choose in such cases.

But I am far from saying that a landlord can never be guilty of living on the immoral earnings of his tenant. To my mind, the most obvious case is where he takes advantage of her difficulty in getting accommodation to extract from her in the guise of rent sums beyond any normal commercial rent. In reality he is not then merely acting as landlord; he is making her engage in a joint adventure with him which will bring to him a part of her immoral earnings over and above rent. And there may well be other ways in which he can make himself a participator in her earnings and not merely a recipient of rent. The line may sometimes be difficult to draw, but juries often have to decide broad questions of that kind.

Then I take the tradesman. Is the criterion to be whether he supplied goods or services which he knew that this woman would not require if she were not a prostitute or is it to be whether the goods or services are of a kind which no honest woman would require? I doubt very much whether either distinction would be easy to draw in practice. Presumably

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Brooks in Pearce *v.* Brooks (1866) L.R. 1 Ex. 213, would not have required the brougham if she had not been a prostitute. Whether the brougham was of a kind which some honest woman might have required I do not know. If a case of that kind occurred today, would it depend on such niceties whether Pearce was living on Brook's immoral earnings? We were informed that sometimes decorators or furnishers are asked to do or supply something which it is at least unlikely that an honest woman would require. But it is perhaps difficult to set limits to honest eccentricity.

I suppose there might be a tradesman who was as purely parasitical as the accused and there might be a tradesman who used his trade as a means to become a joint adventurer with prostitutes. But leaving such possible cases aside, I could not hold that a tradesman who supplies goods or services to a prostitute in the ordinary course of his business is living on her immoral earnings. I cannot find or think of any case which cannot be adequately dealt with on what I think to be the ordinary and natural meaning of the words of the Act.

My Lords, I turn to the first count. With regard to it I have had the advantage of reading the speech about to be delivered by my noble and learned friend Lord Tucker, but I regret to say that I find myself in fundamental disagreement with it. I must therefore state my reasons with some particularity. In my opinion, there is no such general offence known to the law as conspiracy to corrupt public morals. Undoubtedly there is an offence of criminal conspiracy and undoubtedly it is of fairly wide scope. In my view, its scope cannot be determined without having regard first to the history of the matter and then to the broad general principles which have generally been thought to underlie our system and government and in particular our system of criminal law.

It appears to be generally accepted that the offence of criminal conspiracy was the creature of the Star Chamber. So far as I am able to judge, the summary in Kenny's *Outline of Criminal Law*, 17th ed., s. 59, is a fair one. There it is said

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that the criminal side of conspiracy was " emphasised by the Star Chamber, which recognised its possibilities as an engine of government and moulded it into a substantive offence of wide scope, whose attractions were such that its principles were gradually adopted by the common law courts." The Star Chamber perhaps had more merits than its detractors will admit, but its methods and principles were superseded and what it did is of no authority today. The question is how far the common law courts in fact went in borrowing from it.

I think that Lord Goddard C.J. was repeating the generally accepted view when he said: " A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means " (NEWLAND (1954) 37 Cr. App.R. 154, at p. 164; [1954] 1 Q.B. 158 at p. 166). But what is an " unlawful act? " To commit a crime—yes, but what about offences which can only be dealt with summarily and punished lightly? they are certainly unlawful acts, but (I quote from the *Law of Criminal Conspiracies and Agreements*, by R. S. Wright J., p. 83) they " are not in themselves of grave enough consequence to be matters for indictment; and if so it must in general be immaterial whether the results are produced by one person or by two or more persons. To permit two persons to be indicted for a conspiracy to make a slide in the street of a town, or to catch hedge sparrows in April, would be to destroy that distinction between crimes and minor offences which in every country it is held important to preserve." To commit a tort—yes in certain cases, but for somewhat similar reasons it seems to be at least doubtful whether it is an offence to conspire to commit a tort which is neither malicious nor fraudulent nor accompanied by violence.

Then there is undoubtedly a third class of act which an individual can do with impunity but a combination cannot. Perhaps the best known example is conspiring to injure a man in his trade if done without justification. I need only refer to the series of cases in this House from MOGUL S.S. Co. *v.* McGREGOR, GOW & Co. [1892] A.C. 25 to CROFTER HAND WOVEN

Harris Tweed Co. *v.* Veitch [1942] A.C. 435. No one has ever attempted to define what makes an act "unlawful" so as to bring it within this class; the law seems to be haphazard depending largely on historical accident. Perhaps as good a summary as any is that which goes back to early editions of Professor Kenny's book (now s. 451) "certain other acts . . . which . . . are not breaches of law at all, but which nevertheless are outrageously immoral or else are, in some way, extremely injurious to the public." One thing does, however, appear to be reasonably clear. So far as I have been able to trace, all who took part in the Mogul S.S. Co. series of cases (*supra*) and who mentioned the matter, except Lord Esher, were of opinion that to make or carry out a contract which is unenforceable by reason of immorality or otherwise is not an unlawful act in this sense.

There are two competing views. One is that conspiring to corrupt public morals is only one facet of a still more general offence, conspiracy to effect public mischief; and that, like the categories of negligence, the categories of public mischief are never closed. The other is that, whatever may have been done two or three centuries ago, we ought not now to extend the doctrine further than it has already been carried by the common law courts. Of course I do not mean that it should only be applied in circumstances precisely similar to those in some decided case. Decisions are always authority for other cases which are reasonably analogous and are not properly distinguishable. But we ought not to extend the doctrine to new fields.

I agree with R. S. Wright J. when he says (*Law of Criminal Conspiracies and Agreements*, p. 86): "There appear to be great theoretical objections to any general rule that agreement may make punishable that which ought not to be punished in the absence of agreement." And I think, or at least I hope, that it is now established that the courts cannot create new offences by individuals. So far at least I have the authority of Lord Goddard C.J. in delivering the opinion of the court in NEWLAND (at pp. 166 and 167 of the respective reports): "The dictum in HIGGINS (1801) 2 East 5, was that all offences of a public nature, that is all such acts or attempts as tend to the prejudice of the public, are indictable, but no other member of the court stated the law in such wide terms. It is the breadth of that dictum that was so strongly criticised by Sir Fitzjames Stephen in the passage in his *History of the Criminal Law* (Vol. 3, p. 359) and also by Dr. Stallybrass in 34 *Law Quarterly Review*, p. 183. In effect it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom or at least only at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences." Every argument against creating new offences by an individual appears to me to be equally valid against creating new offences by a combination of individuals. But there is this historical difference. The judges appear to have continued to extend the law of conspiracy after they had ceased to extend offences by individuals. Again I quote from R. S. Wright J. (p. 88): "In an imperfect system of criminal law the doctrine of criminal agreements for acts not criminal may be of great practical value for the punishment of persons for acts which are not, but which ought to be made punishable irrespective of agreement."

Even if there is still a vestigial power of this kind it ought not, in my view, to be used unless there appears to be general agreement that the offence to which it is applied ought to be criminal if committed by an individual. Notoriously there are wide differences of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. Some think that the law already goes too far, some that it does not go far enough. Parliament is the proper place, and I am firmly of opinion the only proper place, to settle that. When there is sufficient support from public opinion, Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the courts to rush in.

Before turning to the question whether the authorities on a fair construction warrant indictment on this charge, I must notice the offence of conspiring to effect public mischief. The most recent authority is NEWLAND'S case (*supra*). There I do not think that the court went beyond the ambit of earlier decisions. One of the early uses of this doctrine of conspiracy appears to have been to deal with various forms of cheating which no one would say ought not to be punished, but which the common law had not made offences if done by an individual. Newland had conspired to obtain advantage for himself by using false and deceptive documents and devices to obtain for sale on the home market goods which manufacturers were only allowed to sell for export. Lord Goddard C.J. said (at pp. 161 and 164 of the respective reports): "It is enough to show that they (the suppliers) would not have acted as they did but for the false representations and dishonesty of the person who obtained the goods from them."

In my judgment, this House is in no way bound and ought not to sanction the extension of "public mischief" to any new field, and certainly not if such extension would be in any way controversial. Public mischief is the criminal counterpart of public policy and the criminal law ought to be even more hesitant than the civil law in founding on it in some new aspect. I think that the following comments are as valid today as they were in 1824: "I am not much disposed to yield to arguments of public policy. I think the courts of Westminster Hall have gone much further than they were warranted in going in questions of policy: they have taken on themselves sometimes to decide doubtful questions of policy: and they are always in danger of so doing because courts of law look only at the particular case and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy" (*per* Best C.J. in RICHARDSON *v.* MELLISH (1824) 2 Bing. 229 at p. 242). "I protest against arguing too strongly upon public policy; it is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail" (*per* Burrough J., *ibid.* at p. 252).

It may perhaps be said that there is no question here of creating a new offence because there is only one offence of conspiracy—agreeing or acting in concert to do an unlawful act. In a technical sense that is true. But in order to extend this offence to a new field the court would have to create a new unlawful act: it would have to hold that conduct of a kind which has not hitherto been unlawful in this sense must now be held to be unlawful. It appears to me that the objections to that are just as powerful as the objections to creating a new offence. The difference is a matter of words; the essence of the matter is that a type of conduct for the punishment of which there is no previous authority now for the first time becomes punishable solely by a decision of a court.

I therefore proceed to consider the authorities on the footing that the courts cannot now create a new offence or a new kind of criminal conspiracy, or at least that, if any such power still exists, this is not a proper sphere in which to exercise it. The majority of the cases cited to us were instances of one or other of four well-established offences; offences which can be committed by an individual as well as by a combination. They are publication of an obscene libel, indecent exposure, exhibition in public of indecent things or acts, and keeping a disorderly house. I shall deal with the relevance of these in a few moments when I come to the facts of the present case. But there is a group of four cases which are more directly relevant here—LORD GREY'S CASE (1682) 9 St.Tr. 127, DELAVAL'S CASE (1763) 3 Burr. 1434, MEARE'S AND CHALK'S CASE (1851) 4 Cox 423, and HOWELL'S CASE (1864) 4 F. & F. 160. These were all cases of conspiracy to seduce a girl under twenty-one or to induce a young girl to become a prostitute. I would agree that they are good authority for it being criminal to conspire to seduce a young girl. But I would not agree that by analogy they must be held to be good authority for it being criminal to conspire to "seduce" a man of mature years. Indeed I think that the judges who decided these cases would have been very surprised to learn that they had thereby decided that conspiring to seduce a man is a crime. And it must be observed that there was no public element in these cases: they were conspiracies to seduce a particular girl. So, if we are to proceed by analogy, it must be a crime today to conspire to seduce a particular man and the offence cannot be limited to a conspiracy to corrupt *public* morals.

But in argument more stress was put on words which are reported to have been used by the judges than on the actual decisions, and in particular on the statement by Lord Mansfield and others that the Court of King's Bench was *custos* or *censor morum.* It was said that they thereby decided or recognised that any conspiracy to corrupt morals or, as the learned trial judge put it in the present case, "to lead morally astray" was an indictable offence. I do not think so. As the reports of those days are not full reports of the judgments, we do not have the precise context, but I think it much more probable that these judges were intending to say that they then had power to create new offences, that this power extended to the moral field, and that the acts in these particular cases should be held to be punishable. It must be observed that these references to the court being *censor* or *custos morum* occur equally in decisions in cases of conspiracy and in cases against individuals. In the eighteenth century courts created new offences in the field of morals both against individuals (see for example CURL'S CASE (1727) 2 Str. 788) and against combinations. So if, contrary to my view, the references established a general offence of conspiring to corrupt public morals, then surely they must also have established that it is a general offence for an individual to act so as to corrupt public morals or to attempt to do so. If it was established in the eighteenth century that there was a general offence of conspiring to corrupt public morals (or to lead members of the public morally astray) then, as the essence of criminal conspiracy is doing or agreeing to do an unlawful act, it must follow that for two centuries every act which has tended to lead members of the public astray morally has been an unlawful act, and the respondent's argument would apply equally to make unlawful every act which tends to lead a single individual morally astray. In the unending controversy about the proper relationship between law and morals no one seems to have suspected that. Hitherto I think there has been a wide measure of agreement with Professor Kenny's view that only *certain acts* which are *outrageously* immoral are unlawful in this sense.

I claim little knowledge of the history of English criminal law—any such knowledge that I may have is of a different system. But it seems that most crimes must have been the creation of judges of a remoter time, because Parliament played a comparatively small part and there was no reception of any foreign system. And it seems that they proceeded piecemeal, taking care no doubt not to move in advance of contemporary opinion, and that they did not first invent a general theory or a general offence and then apply it at once to a wide variety of particular cases. A somewhat similar situation arose in connection with equally general statements by equally eminent judges that Christianity is part of the law of England. That was dealt with in this House in BOWMAN *v.* SECULAR SOCIETY [1917] A.C. 406, where it seems to me that more attention was paid to what the courts had in fact done than to the language that judges had used in doing it.

But the best test appears to me to be to look at the views expressed by the authors and later editors of standard works on crime. Passages were cited to us from Hawkins' *Pleas of the Crown*, East's *Pleas of the Crown*, and Blackstone, as well as from later standard works. None of them appears to have realised that any such general and far-reaching offence had been established. Hawkins refers to open lewdness grossly scandalous (Vol. I, p. 358), Blackstone (Book IV, p. 64) to open and notorious lewdness, East to scandalous and open breaches of morality exhibited in the face of the people (Vol. I, p. 3), and Russell (11th ed., Vol. 2, ch. 97) deals separately with each of the specific offences which I have already mentioned. We were referred to no passages supporting the view for which the respondent now contends and I cannot think that it is only now, after nearly two centuries, that it has been vouchsafed to us to discover the true meaning of these old cases.

I must now deal with the particulars of the first count and the facts proved to see whether they disclose that the accused committed some offence of more limited scope than conspiracy to corrupt public morals. It is alleged that the accused and others conspired by means of the publication of certain advertisements to induce readers thereof to resort to prostitutes named in these advertisements for the purposes of (a) fornication, (b) taking part in " other disgusting and immoral acts " or (c) witnessing " other disgusting and immoral exhibitions." I shall not deal with (c) because no attempt was made to prove this. The intent alleged is twofold—(a) with intent thereby to debauch and corrupt the morals of certain of the lieges and (b) with intent thereby to raise and create in their minds inordinate and lustful desires. I find this very obscure. Which of the lieges are referred to? Is it only those persons who are induced to resort to the prostitutes or is it all persons who read the publication? If it means that debauching and corrupting only occur (or may occur) when a man resorts to a prostitute, that is one thing: but if it means that a man may be debauched and corrupted merely by reading the advertisements, that appears to me to raise a different and wider question and to involve a consideration of the Obscene Publications Act, 1959. I am inclined to think that these intents are stated in the wrong order and that what is meant is with intent to raise inordinate and lustful desires in the minds of those who read the advertisements and then to debauch and corrupt those who are thereby induced to resort to the prostitutes. I am not at all sure whether the proposition is that an offence is committed merely by conspiring to publish matter which tends to raise in the minds of readers inordinate and lustful desires, or whether the real offence is said to be conspiring to publish matter which tends to induce men to resort to prostitutes.

No authority was cited to us which goes so far as to hold that any writing could be held to be an obscene libel merely on the ground that, although its language is in itself decent and inoffensive, it may tend to raise in the minds of its readers some lustful desire—I leave aside for the moment the word "inordinate" in the particulars. In Victorian times very strict views were held about books or pictures that were in any way "suggestive," but no authority was cited to us which in any way indicates that it was ever held to be an indictable offence merely to publish such matter without there being something more to bring it into the category of being obscene.

Section 1 of the 1959 Act defines "obscene" by enacting that an article (which includes all matter to be read or looked at) shall be deemed to be obscene if its effect is to tend to deprave and corrupt. But I cannot find any intention to widen the old law of obscene libel or to make it possible for a prosecutor to charge as obscene libel publication in wholly inoffensive terms of any matter which tends to raise lustful desires in the mind of a reader, whether that matter be allusion to or commendation of fornication or merely the name and address of a prostitute.

But I need not pursue that matter because, as I understood the Solicitor-General, he did not argue that these advertisements were obscene libels and that must mean that merely reading them does not tend to deprave or corrupt—if it did, they would be obscene libels by virtue of the definition in the Act, conspiracy to publish them would obviously be a crime, and the point now in controversy would never have arisen.

So any depraving and corrupting must be the result of resorting to the prostitutes and the offence, if any, must be

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conspiring to tempt the lieges to resort to prostitutes. Prostitution is not an offence: it is not said that the woman or any man resorting to her is guilty of any offence. The argument is that if two or more persons (who may include the prostitute herself) combine to issue such an invitation to members of the public they are guilty of an offence. It could not matter whether the invitation was made by words or in some other way. So both Pearce and Brooks in Pearce *v.* Brooks (*supra*) would today be guilty of an indictable offence by reason of having acted in concert to enable Brooks to attract men for the purpose of prostitution. That seems to me to be novel doctrine. It hardly seems to accord with views expressed in the Mogul series of cases (*supra*) to which I referred earlier, and I cannot believe that it is right.

But the advertisements also contain much more objectionable matter. The particulars refer to inducing readers to take part in " other disgusting and immoral acts " and with this I think there must be coupled the reference in the intent charged to " inordinate " desires. The evidence shows that the invitations were to resort to certain of the prostitutes for the purpose of certain forms of perversion. That I would think to be an offence for a different reason.

I shall not examine the authorities, because I think that they establish that it is an indictable offence to say or do or exhibit anything in public which outrages public decency, whether or not it also tends to corrupt and deprave those who see or hear it. In my view, it is open to a jury to hold that a public invitation to indulge in sexual perversion does so outrage public decency as to be a punishable offence. If the jury in this case had been properly directed, they might well have found the accused guilty for this reason. And the offence would be the same whether the invitation was made by an individual or by several people acting in concert. But it appears to me to be impossible to say the same with regard to ordinary prostitution. The common law has never treated the appearance of a prostitute in public as an indictable offence however obvious her purpose might be, and an Act of Parliament has been found necessary to stop the nuisance of prostitutes parading in the public street.

Finally I must advert to the consequences of holding that this very general offence exists. It has always been thought to be of primary importance that our law, and particularly our criminal law, should be certain: that a man should be able to know what conduct is and what is not criminal, particularly when heavy penalties are involved. Some suggestion was made that it does not matter if this offence is very wide: no one would ever prosecute and if they did no jury would ever convict if the breach was venial. Indeed, the suggestion goes even further: that the meaning and application of the words "deprave" and "corrupt" (the traditional words in obscene libel now enacted in the 1959 Act) or the words "debauch" and "corrupt" in this indictment ought to be entirely for the jury, so that any conduct of this kind is criminal if in the end a jury think it so. In other words, you cannot tell what is criminal except by guessing what view a jury will take, and juries' views may vary and may change with the passing of time. Normally the meaning of words is a question of law for the court. For example, it is not left to a jury to determine the meaning of negligence: they have to consider on evidence and on their own knowledge a much more specific question—Would a reasonable man have done what this man did? I know that in obscene libel the jury has great latitude, but I think that it is an understatement to say that this has not been found wholly satisfactory. If the trial judge's charge in the present case was right, if a jury is entitled to water down the strong words "deprave," "corrupt" or "debauch" so as merely to mean lead astray morally, then it seems to me that the court has transferred to the jury the whole of its functions as *censor morum*, the law will be whatever any jury may happen to think it ought to be, and this branch of the law will have lost all the certainty which we rightly prize in other branches of our law.

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LORD TUCKER: My Lords, with regard to the conviction of the appellant under count 2 of the indictment I am in complete agreement with the speech of my noble and learned friend on the Woolsack. The first count charged the appellant in the following terms: "*Statement of Offence.* Conspiracy to corrupt public morals. *Particulars of Offence.* Frederick Charles Shaw on divers days between October 1, 1959, and July 23, 1960, within the jurisdiction of the Central Criminal Court, conspired with certain persons who inserted advertisements in issues of a magazine entitled *Ladies' Directory* numbered 7, 7 Revised, 8, 9, 10 and a supplement thereto, and with certain other persons whose names are unknown, by means of the said magazine and the said advertisements to induce readers thereof to resort to the said advertisers for the purposes of fornication and of taking part in or witnessing other disgusting and immoral acts and exhibitions with intent thereby to debauch and corrupt the morals as well of youth as of divers other liege subjects of Our Lady the Queen and to raise and create in their minds inordinate and lustful desires." It should, I think, be stated at the outset that the words "or witnessing" in the above particulars were not relied upon by the prosecution at the trial as constituting an essential ingredient in the alleged conspiracy nor was there any evidence that the advertisements constituted an invitation to the public to resort to the addresses of the advertisers as spectators for the purpose of witnessing disgusting and immoral acts and exhibitions. The case made by the prosecution was that the advertisements constituted invitations to the male public of all ages to visit the addresses of prostitutes for the purpose of fornication and in some instances taking part in perversive practices. I shall accordingly treat the indictment as if the words "or witnessing" had been omitted.

Counsel for the appellant put in the forefront of his address the submission that there is no such offence known to the law as a conspiracy to corrupt public morals. Before turning to authority I would invite your Lordships to pause to consider for a moment how far-reaching are the consequences of such a proposition, if it be correct. It has for long been accepted that there are some conspiracies which are criminal, although the acts agreed to be done are not *per se* criminal or tortious, if done by individuals. Such conspiracies form a third class in addition to the well-known and more clearly defined conspiracies to do acts which are unlawful, in the sense of criminal or tortious, or to do lawful acts by unlawful means. Assuming that the corruption of public morals by the acts of an individual may not be criminal or tortious, does it follow that a conspiracy by two or more persons to this end is not indictable? The difficulty with regard to this third class of conspiracy has always been to define its limits or give it a label which will include all its manifestations. It was referred to by Viscount Simon in CROFTER HAND WOVEN HARRIS TWEED CO. *v.* VEITCH [1942] A.C. 435, at p. 439 as one in which " the purpose aimed at, though not perhaps specifically illegal, was one which would undermine the principles of commercial or moral conduct." The late Professor Kenny in the eleventh edition of his *Outlines of Criminal Law* at p. 290, in a passage which is repeated in later editions, wrote: " An unlawful purpose. The term ' unlawful ' is here used in a sense which is unique; and unhappily has never yet been defined precisely. The purposes which it comprises appear to be of the following species: . . . " (4) Agreements to do certain other acts which (unlike all those hitherto mentioned) are not breaches of law at all, but which nevertheless are outrageously immoral or else are in some way extremely injurious to the public." He gives a number of examples.

An instance in modern times is to be found in the case of NEWLAND AND OTHERS, 37 Cr.App.R. 154; [1954] 1 Q.B. 158, where the appellants had been convicted of conspiring to effect a public mischief by obtaining and distributing on the home market for eventual retail sale decorated domestic pottery which, by orders made under the Defence (General)

Regulations, manufacturers and registered exporters were permitted to supply for export only. The orders did not in terms deal with persons who obtained such goods from a manufacturer representing that they were for export and then having obtained them sold them on the domestic market. It was contended on behalf of the appellants that there was no such offence known to the law as set out in the indictment. In delivering the judgment of the Court of Criminal Appeal Lord Goddard C.J. said: (37 Cr.App.R. at p. 163; [1954] 1 Q.B. at p. 165) "It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld: BRAILSFORD [1905] 2 K.B. 730; PORTER, 3 Cr. App.R. 237; [1910] 1 K.B. 369 and BASSEY (1931) 22 Cr. App.R. 160. The court is well aware of the caution with which they should approach the consideration of an offence which is alleged to consist of doing acts which tend to effect public mischief as, if extended, it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed out by Sir Fitzjames Stephen, the most prominent institutional writer on criminal law in the last century, in his *History of the Criminal Law*, Vol. 3, p. 359. We think that we may say that the court should approach the subject at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy . . . No one has ever attempted to define what may or may not constitute a public mischief and we have certainly no desire to increase the number of criminal offences by adding to the category of misdemeanours. But there are two points which in our opinion do not make it necessary for us to consider whether there is here any attempt to create a new offence. In the first place it is well known that there may be many acts which if done by an individual would not be indictable or even actionable as a tort and yet may become both actionable and

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criminal if done by a combination of persons as the result of a conspiracy, and for this really elementary proposition we need only refer to QUINN *v.* LEATHEM [1901] A.C. 495."

My Lords, I have referred to this case, as in my opinion the decision of the present and other similar cases does not depend upon the label which is to be attached to a particular conspiracy. Can it be doubted that a conspiracy to corrupt public morals is a conspiracy to effect a public mischief? Is it to be said that a conspiracy to sell decorated domestic pottery in the home market by means of devices contrived to evade the object of the Board of Trade Orders is a criminal conspiracy, but an agreement to do acts calculated to corrupt public morals is not? Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to a jury? Similarly with regard to a conspiracy to encourage and promote Lesbianism today, or incestuous sexual intercourse in the year 1907? My Lords, if these questions are to be answered in the negative I would expect to find some clear authority during the past centuries which would justify such an answer. I know of none.

I have, I think, sufficiently indicated my view that the decision of this case does not depend upon a detailed examination of the old authorities in order to ascertain whether in every case the act or acts in question, whether performed or proposed, constituted common law misdemeanours in themselves at the date of the decisions. If they did, then the conspiracy alleged was admittedly criminal, but if they did not, it would in my view be equally criminal if the acts were of a nature to satisfy a jury that they were wrongful in the sense of being calculated to corrupt and deprave public morals. I therefore do not propose to refer to the cases where individuals have been convicted of the common law misdemeanour of public indecency by exposure or other indecent acts in the face of the public such as that of SIR CHARLES SIDLEY, 1 Sid. 168 in the year 1663 or other similar cases culminating in 1875 with that of SAUNDERS AND HITCHCOCK, 1 Cox 116, where the defendants were held to have been properly convicted on counts charging them with keeping a booth on Epsom Downs for the purpose of a disgusting and indecent exhibition to which they invited all persons within the reach of their voices. This was held to constitute a common law misdemeanour. Counsel for the appellant argued with force that such cases are distinguishable from the present and other cases where the acts, though immoral, were not acts of indecency done in the face of the public, but as I do not consider it necessary to explore this aspect of the case I turn therefore to the authorities which are more immediately relevant, *viz.*, those in which conspiracy was charged. In DELAVAL AND OTHERS, 3 Burr. 1435, in the year 1763 the charge was that the defendants had joined in an unlawful combination and conspiracy to remove a girl, an infant about eighteen, out of the hands of the defendant Bates (musician) to whom she was bound an apprentice by her father (a gentleman's coachman) without the knowledge or approbation of her father and to place her in the hands of Sir Francis Delaval for the purpose of prostitution. For which purpose she was discharged by Bates, her master, from the indentures of her apprenticeship to him, in consideration of £200 (the penalty of them) paid to him by Sir Francis; and was then bound by the usual indentures of apprenticeship to Sir Francis. The charge went on to set out the part played by Fraine the attorney in drawing up the indentures and the agreement between Sir Francis and Bates. Having adjourned the motion for an information against the defendants for conspiracy in order that the court might be satisfied that the girl's father was not a party to the conspiracy and being satisfied that such was not the case, Lord Mansfield delivered the judgment of the court. He described (at p. 1437) the conspiracy as one "to put this young girl, an apprentice to one of them, into the hands of a gentleman of rank and fortune for the purpose of

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prostitution; contrary to decency and morality and without the knowledge or approbation of her father; who prosecutes them for it and has now cleared himself of all imputation and appears to be an innocent and an injured man. . . . Thus she has been played over by Bates into his hands for this purpose. No man can avoid seeing all this; let him wink ever so much. I remember a cause in the Court of Chancery wherein it appeared that a man had formally assigned his wife over to another man: and Lord Hardwick directed a prosecution for that transaction as being notoriously and grossly against public decency and good manners. And so is the present case. It is true that many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical Court and are appropriated to it. But if you except those appropriated cases this court is the *custos morum* of the people, and has the superintendency of offences *contra bonos mores*: and upon this ground, both Sir Charles Sidley and Curl, who had been guilty of offences against good manners, were prosecuted here. *However, besides this, there is in the present case, a conspiracy and confederacy amongst the defendants: which are clearly and indisputably within the proper jurisdiction of this court.*" (The italics are mine.)

My Lords, some writers have been at pains to point out grounds upon which this case might have decided, but I suggest it is not necessary or even permissible to go outside the expressed reasons of Lord Mansfield. Furthermore, it is to be observed that at that date not only was there no crime of abduction of a girl over sixteen, not being an heiress (see Holdsworth's *History of English Law*, Vol. 4, pp. 504 and 515), but the girl's master was willing and she was not in the custody of her father. There is no such tort as seduction in the absence of loss of services which was not and could not have been alleged, and there is no mention of breach of contract anywhere in the case.

It is clear and compelling authority in support of the existence of the crime of conspiracy to corrupt the morals of

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an individual and *a fortiori* of the public. In MEARS AND CHALK (1851) 4 Cox 423, the indictment contained three counts. The third count alleged that the accused " did between themselves conspire, combine, confederate and agree together wickedly and designedly to procure by false pretences, false representations and other fraudulent means the said Johanna Carroll, then being a poor child under the age of twenty-one years, to wit the age of fifteen years, to have illicit carnal connection with a man, to wit a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity."

Jervis C.J. in giving judgment at p. 427, said: " It is unnecessary to discuss the first and second counts and upon them we give no opinion because we all think that the third is a good count; the court being clearly of opinion that a conspiracy to solicit prostitution being against good morals and public decency is, *independently of the statute*, an indictable offence (Italics are mine.) HOWELL AND BENTLEY (1864) 4 F. & F. 160, was a case of conspiracy to solicit, persuade and procure an unmarried girl of the age of seventeen to become a common prostitute. A count so framed was upheld. Bramwell B. said (at p. 164): " I believe that it is not an offence at common law for a woman to be a common prostitute. But in my opinion that is not the criterion. There are many unlawful things which are not the subject of criminal proceedings of any kind. . . . We have all the necessary ingredients of the offence of conspiracy." In BERG AND OTHERS (1927) 20 Cr. App.R. 38, the second count in the indictment charged the above-named and three others with conspiracy to corrupt public morals and the particulars thereof were that they on divers days therein stated " conspired together and with other persons unknown to debauch and corrupt the minds and morals of such persons as should be induced or permitted to come to certain premises being the basement flat No. 25 Fitzroy Square in the said county and there remain tippling, whoring and behaving in an obscene and disorderly manner." Berg pleaded not guilty to both counts. He was found not guilty on count 1, which charged him with aiding and abetting Britt and Carre in keeping a disorderly house, but guilty on count 2. The Court of Criminal Appeal in the present case were in error in saying that all the accused named in that count pleaded guilty. Inspection of the original indictment shows that Berg in fact pleaded not guilty to both counts. The report of the hearing before the Court of Criminal Appeal is not very satisfactory, but, as Berg had been acquitted on count 1, he must have been appealing against his conviction on count 2 and this is confirmed by the argument of his counsel (Mr. Byrne) at p. 40. The original indictment shows that the report is inaccurate in its description of the conspiracy count. The words " disorderly house " do not in fact appear in count 2, but only in count 1. All the appeals were dismissed by a court presided over by Avory J. who stated that the gist of the indictment was that the accused were lewd and immoral persons assembled for the purpose of unnatural practices. Finally in 1960 there was the unreported case of DALE AND OTHERS in which the accused were convicted at the Central Criminal Court on a count in an indictment charging a conspiracy to corrupt and debauch such persons as should resort to a certain disorderly house therein named.

It was further contended for the appellant that in any event the particulars in the indictment and the evidence adduced in support thereof were insufficient to support a conviction for conspiring to corrupt public morals. It was said that neither fornication nor prostitution are illegal and that in any event there is no precedent for holding that such conduct tends to corrupt and deprave adult males.

My Lords, I think that these were matters for the decision of the jury and that the learned judge was right in ruling that there was a case to be left to them. There was material in this case to support the view that some of the advertisements in the magazines indicated that the advertisers were willing to

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take part in acts of sexual perversion. This element was, I think, conclusive against the appellant's submission, but I am not to be taken as expressing the view that in the absence of this feature the case should have been withdrawn from the jury who must be the final arbiters in such matters, as they are on the question of obscenity. They alone can adequately reflect the changing public view on such matters through the centuries. As regards lack of precedent, apart from the recent cases of Berg and Others in 1927 and Dale and Others in 1960, I would remind your Lordships of the words of Parke J. in Mirehouse *v.* Rennell (1833) 1 Cl. & Fin. 527 at p. 546: "The case therefore is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty we must apply those rules, where they are not plainly unreasonable or inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view not merely for the determination of the particular case, but for the interests of law as a science."

My Lords, the Solicitor-General supported the conviction and the judgment of the Court of Criminal Appeal on count 1 of the present indictment on two alternative grounds, (1) that conduct calculated and intended to corrupt public morals is indictable as a substantive offence and consequently a conspiracy to this end is indictable as a conspiracy to commit a criminal offence, alternatively (2) a conspiracy to corrupt morals is indictable as a conspiracy to commit a wrongful act which is calculated to cause public injury. The Court of Criminal Appeal dismissed the appeal on the ground that the case fell well within the first of these propositions. I have, I hope, sufficiently indicated that I prefer to base my decision on the second, but in so saying I must not be taken as rejecting the first.

A further submission by the appellant must now be mentioned. It was argued that in any event count 1 offended against the provisions of section 2 (4) of the Obscene Publications Act, 1959, which reads: " A person publishing an article shall not be proceeded against for an offence at common law consisting of the publication of any matter contained or embodied in the article where it is of the essence of the offence that the matter is obscene."

My Lords, I agree with the judgment of the Court of Criminal Appeal that the short answer to this argument is that the offence at common law alleged, namely conspiracy to corrupt public morals, did not " consist of the publication " of the magazines, it consisted of an agreement to corrupt public morals by means of the magazines which might never have been published.

Finally it was said that the learned judge did not sufficiently direct the jury as to the meaning of the words " debauch and corrupt " in count 1, and one passage in particular in his charge to the jury was subjected to criticism in which he said: " Well, members of the jury, no doubt you will take the view that whatever else you may have to decide in this case it is quite unnecessary for you to decide the merits or demerits of extra-marital intercourse. And really the meaning of debauch and corrupt is again, just as the meaning of the word induce is, essentially a matter for you. After all the arguments, I wonder really whether it means in this case and in this context much more than lead astray morally. You will have to consider it in your own minds, and, as I say, you must put your own interpretation on the meaning of the words." The words "lead astray morally" were objected to and were said to amount to a misdirection. In this and other passages later in his judgment he makes it clear that it is for the jury to construe and apply these words to the facts proved in evidence and reach their own decision, and neither in the passage cited nor in the judgment as a whole can I find anything that amounts to misdirection.

For these reasons I am of opinion that the appeal with regard to the conviction on count 1 also fails.

LORD MORRIS OF BORTH-Y-GEST: My Lords, I have had the privilege of reading in advance the speeches which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend Lord Tucker and I am in agreement with them.

The appellant was convicted not only on the two counts which are before your Lordships but also on a third count, which was one of publishing an obscene article contrary to section 2 of the Obscene Publications Act, 1959. The article in question consisted of one issue of the *Ladies' Directory*. Before they could convict of that charge the jury had to be satisfied that the appellant published the article and that it was obscene. It is provided by the Act that for the purposes of the Act an article is deemed to be obscene if its effect taken as a whole is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. The jury must have been satisfied that the effect of the article was to tend to deprave and corrupt those who were likely to read or see it. While I concur with your Lordships in thinking that the provision contained in section 2, subsection (4) of the Act did not debar the prosecution from presenting and passing the charge contained in count 1, I have wondered whether they might not in this particular case have been content to put matters to the test by reference only to the other counts. It was the appellant who conceived and carried out the plan of producing the publications in question. He did so for his own gain. The conspiracy features of his conduct added little in this case to the real gravity of his actions.

I join, however, with those of your Lordships who affirm that the law is not impotent to convict those who conspire to corrupt public morals. The declaration of Lord Mansfield (see JONES *v.* RANDALL (1774) Lofft. 383, at p. 385) that " whatever is *contra bonos mores* [*et*] *decorum*, the principles of our law prohibit, and the King's Court, as the general censor and guardian of the public manners, is bound to restrain and punish " is echoed and finds modern expression in Kenny's *Outlines of Criminal Law* (17th ed.), in the statement that agreements by two or more persons may be criminal if they are agreements to do acts which are outrageously immoral or else are in some way extremely injurious to the public. There are certain manifestations of conduct which are an affront to and an attack upon recognised public standards of morals and decency and which all well-disposed persons would stigmatise and condemn as deserving of punishment. The cases afford examples of the conduct of individuals which has been punished because it outraged public decency or because its tendency was to corrupt the public morals.

It is said that there is a measure of vagueness in a charge of conspiracy to corrupt public morals and also that there might be peril of the launching of prosecutions in order to suppress unpopular or unorthodox views. My Lords, I entertain no anxiety on those lines. Even if accepted public standards may to some extent vary from generation to generation, current standards are in the keeping of juries who can be trusted to maintain the corporate good sense of the community and to discern attacks upon values that must be preserved. If there were prosecutions which were not genuinely and fairly warranted, juries would be quick to perceive this. There could be no conviction unless twelve jurors were unanimous in thinking that the accused person or persons had combined to do acts which were calculated to corrupt public morals. My Lords, as time proceeds our criminal law is more and more being codified. Though it may be that the occasions for presenting a charge such as that in count 1 will be infrequent, I concur in the view that such a charge is contained within the armour of the law and that the jury were in the present case fully entitled to decide the case as they did.

I would dismiss the appeal.

LORD HODSON: My Lords, I am in full agreement with the speeches which have been delivered by my noble and learned friend on the Woolsack and by my noble and learned friend Lord Tucker and wish only to add a few sentences on the first count.

I am wholly satisfied that there is a common law misdemeanour of conspiracy to corrupt public morals. The judicial precedents which have been cited show conclusively to my mind that the courts have never abandoned their function as *custodes morum* by surrendering to the legislature the right and duty to apply established principles to new combinations of circumstances. The words of Parke J in MIREHOUSE *v.* RENNELL (1833) 1 Cl. & Fin. 527 at p. 546, read by my noble and learned friend Lord Tucker are not out-dated and in my opinion are applicable to this case. I would stress that in applying the law to the facts which now fall for consideration I do not rest upon the narrow ground that here was a conspiracy to issue a public invitation to indulge in sexual perversion which so outrages public decency as to constitute a punishable offence. It is unnecessary to dwell upon the details of the publications which your Lordships have been obliged to look at. It is sufficient to say that although there are descriptions of sexual eccentricities which to persons of normal instincts may be fairly described as perverted, these eccentricities add nothing to the substance of the charge of conspiracy to corrupt public morals. They amount in the main to the use of theatrical trappings usually associated with prostitution and irregular sexual intercourse, but are in themselves neither more nor less unlawful than prostitution itself.

I will not add to what has already been said about the word "unlawful," agreeing as I do that it has not to be narrowly construed as connoting the commission of a criminal offence.

It has been contended before your Lordships that these advertisements ought to be treated as if they tended only to corrupt the morals of men and should be treated on a different footing from advertisements which would tend to corrupt the morals of women since the law has shown anxiety to protect women from predatory males who have conspired to debauch them, whereas there is no instance of any anxiety in the converse direction. Even if there is any validity in this distinction, which in these days when much is heard of the equality of the sexes I am not disposed to admit, it has no application to the present case. The advertisements no doubt are primarily directed to male persons, but are not so limited. They were exposed for sale and available to both sexes. They are, as a cursory examination reveals, designed to glamorise prostitution and to show by the prices charged to prostitutes for advertising their wares the profits likely to be realised from engaging in their occupation. In the ordinary use of language it seems to me to be plain that the publication of these advertisements to both sexes may properly be held by a jury to tend to corrupt public morals.

That prostitution is not a punishable offence does not involve, as I have already indicated, that it is regarded as a lawful activity. If it were lawful, such a case as PEARCE *v.* BROOKS (1866) L.R. 1 Ex. 213, must have been differently decided. Even if Christianity be not part of the law of England, yet the common law has its roots in Christianity and has always regarded the institution of marriage as worthy to be supported as an essential part of the structure of the society to which we belong. I do not see any reason why a conspiracy to encourage fornication and adultery should be regarded as

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outside the ambit of a conspiracy to corrupt public morals. It is suggested, as I understand it, that this throws the net too wide and in some way it is desirable to show a tenderness towards prostitution as a recognised and necessary evil. I do not accept this approach.

Since a criminal indictment is followed by the verdict of a jury, it is true that the function of *custos morum* is in criminal cases ultimately performed by the jury by whom on a proper direction each case will be decided. This, I think, is consonant with the course of the development of our law. One may take, as an example, the case of negligence where the standard of care of the reasonable man is regarded as fit to be determined by the jury. In the field of public morals it will thus be the morality of the man in the jury box that will determine the fate of the accused, but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: Gerald Black & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE LAWTON

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VICTOR JOHN TERRY

Murder—Diminished Responsibility—Summing-up—No Direction on Medical Evidence—Transcript Handed to Jury—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *s.* 2.

Where the defence of diminished responsibility is raised on a charge of murder, it is no longer to be regarded as a sufficient

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direction that the judge should merely read to the jury the words of section 2 of the Homicide Act, 1957, but a proper explanation of the terms of the section, as interpreted in BYRNE (1960) 44 Cr.App.R. 246; [1960] 2 Q.B. 396, should be given to the jury.

ROSE *v.* R. (1961) 45 Cr.App.R. 102; [1961] 2 W.L.R. 506 followed.

SPRIGGS (1958) 42 Cr.App.R. 69; [1958] 1 Q.B. 270 not followed.

On a trial for murder, in which the substantial defence was that of diminished responsibility and lengthy medical evidence had been called, the judge told the jury that he did not propose to review the medical evidence in detail, but would instead hand them the full transcript so that they could study it when they retired.

Held, that such a practice must be disapproved of and ought not to be followed.

Appeal against conviction.

The appellant was convicted at Sussex Assizes on March 28, 1961, of capital murder and was sentenced by Stable J. to death.

The killing was committed by the appellant in the course of a raid on the bank. The raid was made as the result of a carefully pre-arranged plan between the appellant and two other youths, Tucker and Hosier. On November 9 they bought a shot gun and ammunition, and one of them took and drove away a motor-car. On November 10 they went to the bank in the car as soon as it opened. Hosier stayed outside and the other two went in; the appellant had the gun with him, loaded and cocked. They walked past the cashier and down a passage to a space at the back where there was a safe. At that moment Mr. Pull emerged, carrying a kettle. He had a slight mannerism in that, when about to talk to someone, he raised his hand shoulder high. In this case he did so and actually touched the appellant. The appellant appeared to draw back and to raise the gun; it was fired pointing slightly upwards and the shot went into Mr. Pull's left eye. The appellant and Tucker seized a bag containing over £1,000, and went out to the car, and drove away.

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The defence was twofold; first, that the gun had gone off by accident, and, secondly and / or alternatively, that the appellant was suffering from diminished responsibility.

M. A. B. King-Hamilton, Q.C. and *J. Bolland* for the appellant.

Geoffrey Lawrence, Q.C. and *F. Petre Crowder* for the Crown.

The arguments appear sufficiently from the judgment.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Sussex Assizes of the capital murder of one Pull on November 10, 1960. From that conviction he now appeals to this court.

The short facts, so far as it is necessary to state them, are as follows: The killing was committed by the appellant in the course of a raid on a bank at Worthing, a branch bank of Lloyds Bank. The raid was made as the result of a carefully pre-arranged plan between the appellant and two other youths, Tucker and Hosier. They all lived in London, but the appellant had apparently worked in Worthing for a short time that year. On November 9, the day before, they bought a shot gun and ammunition in London, and one of them, Hosier, I think, took and drove away a parked Wolseley car without the owner's consent. Soon after the bank opened on November 10, about two minutes past ten o'clock, the three of them went to the bank in the car. Hosier stayed outside in the car, and the appellant and Tucker went inside. The appellant had this gun with him at the time loaded and cocked. There was a young cashier called Barker there. The two of them walked past him and down a passage to a space at the back where there was a safe, and it was at that moment that the deceased man, Pull, who had been in a cloakroom, emerged from the cloakroom carrying a kettle. Pull apparently had a slight mannerism that, when he was about to talk to anybody, he would raise his hand shoulder high, and on this occasion faced with two strangers, and particularly the appellant, he apparently raised his hand and, on the evidence, he did actually touch the appellant. The appellant appeared then to draw back and to raise the gun. The gun was fired pointing slightly upwards and the full shot went into Pull's left eye. He fell to the ground, and died shortly afterwards. The appellant and Tucker then turned to the young cashier and said something like: "Where is the money?," and they seized a bag containing over £1,000 in cash. They went out to the waiting car and drove away. On those bare facts it is plain that this is a case of murder in the course of theft, and a very deliberate one.

The defence was twofold, first, that the gun had gone off by accident, and secondly and alternatively, that the appellant was suffering from diminished responsibility within section 2 of the Homicide Act, 1957, two defences which do not run easily in double harness.

[His Lordship then referred to the defence of accident, and the manner in which it had been dealt with in the summing-up and continued.] It is quite clear that the learned judge emphasised over and over again that it was a matter for the jury to decide, and that the onus of proof was on the prosecution. Thus he said: "If you are fully satisfied that there was no element of accident about this operation at all as far as Terry is concerned, you will convict Terry of capital murder."

The second defence was diminished responsibility. This defence was advanced by two eminent psychiatrists for the defence, Dr. Paterson and Dr. Brown. [After referring to their evidence, his Lordship continued.] The summing-up of the learned judge in regard to diminished responsibility has been criticised in a number of respects. Perhaps the most serious criticism is that not only in the first instance did the learned judge merely refer without explanation to the words of section 2 of the Homicide Act, 1957, but that he made little attempt to review the medical evidence in detail. Thus he said this:

"Members of the jury, I am not going to attempt to analyse these three volumes of medical evidence; I am going to hand you the transcripts of the shorthand note and you can study them at your leisure"; and at the end of his summing-up he said: "Members of the jury, that concludes all I have to say to you. Here are the transcripts of the medical evidence which I will hand to you. I am afraid there is only one copy for you; but you can study the whole thing and analyse it."

The court would like to say emphatically that they disapprove of such a practice. It is true that in 1958 in the case of SPRIGGS (1958) 42 Cr.App.R. 69; [1958] 1 Q.B. 270, this court laid down that it was sufficient for the judge to hand copies of section 2 to the jury without any further explanation of the terms of the section; but in that case it is to be observed that the learned judge there went with meticulous care into the evidence given on one side and the other, reviewing it in detail. In the present case it is said that the learned judge really went further than that, because not only in the first instance did he only refer to the section, but he made no attempt to make a meticulous and careful review of the medical evidence. In the opinion of this court, ever since the case of ROSE *v.* R. (1961) 45 Cr.App.R. 102; [1961] 2 W.L.R. 506, a case in the Privy Council, it is not sufficient merely to refer to the words of the section. That decision of the Privy Council refers with approval to the interpretation that this court put upon the section in BYRNE (1960) 44 Cr.App.R. 246; [1960] 2 Q.B. 396, and in the light of that interpretation it seems to this court that it would no longer be proper merely to put the section before the jury, but that a proper explanation of the terms of the section as interpreted in BYRNE (*supra*) ought to be put before the jury. In fairness, however, to the learned judge, it must be stated that after the jury had retired he called them back and did read out to them various passages from the two cases mentioned above.

So far as the handing of the transcripts is concerned, the court feels that that is a bad practice and, in an ordinary case, would not be adequate direction to the jury in regard to the medical evidence. Medical evidence on these matters is difficult to follow and difficult to understand, and it would be quite impossible for a jury in a jury room without any assistance really to understand and appreciate the effect of the evidence. The practice was made worse in the present case in that only one transcript was available, and that a transcript which had been marked by the learned judge in red pencil and with pages turned down. That, as it seems to this court, is an objectionable practice. [After referring to further criticisms of the summing-up, his Lordship continued.]

The court has given this matter anxious consideration. They are indebted for the arguments of counsel on both sides but, having fully considered the matter, they can find no ground to interfere. Accordingly, the appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE LAWTON

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PHILIP MORRIS

Sentence—Manslaughter—Diminished Responsibility—Medical Evidence for Defence that Defendant Required Mental Treatment—Vacancy in Local Hospital—Medical Evidence for Crown Indicating more Serious Mental Trouble—No Evidence of Vacancy in Secure Hospital—Discretion of Judge—Mental Health Act, 1959 (7 & 8 *Eliz.* 2, *c.* 72), *s.* 60, *s.* 72.

The basic principle in an ordinary case, where punishment as such is not intended and where the sole object of the sentence is that the prisoner should receive mental treatment and should be at large as soon as he can safely be discharged, is that the proper exercise of the judge's discretion requires that a hospital order under section 60 of the Mental Health

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Act, 1959, should be made and that the matter should not be left to be dealt with by the Secretary of State under section 72.

On a defence of diminished responsibility arising out of a "mercy" killing, doctors called for the defence gave evidence that the prisoner required mental treatment and that a vacancy was available in a local non-secure hospital, but medical evidence called for the Crown indicated that the degree of mental trouble from which the prisoner was suffering was considerably more serious than that spoken to by the doctors for the defence. The judge, although not regarding the prisoner as meriting punishment, decided that he could not take the responsibility of setting him anywhere near liberty and that he ought to pass a sentence which would involve the prisoner being entirely within the hands of the Secretary of State under section 72.

Held, that in the particular circumstances of the case there was no ground for interfering with the exercise of the judge's discretion.

Appeal against sentence.

The appellant was convicted at Glamorgan Assizes on December 6, 1960, of manslaughter arising out of a defence of diminished responsibility and was sentenced by Austin Jones J. to imprisonment for life.

The appellant was convicted of the killing of his wife, who had been seriously ill, and the circumstances were those of a "mercy" killing. The defence was that of diminished responsibility and medical evidence was called for the defence indicating that the appellant was suffering from depression superimposed on a chronic anxiety state, which impaired his mental responsibility. The doctors gave evidence that he required mental treatment and that a vacancy was available in a local Welsh hospital. The Crown sought to call rebutting evidence with a view to establishing that the appellant was insane within the M'Naghten Rules, but the judge refused to allow the issue of insanity to be raised. He allowed, however, medical evidence to be called for the Crown to the effect that the appellant's degree of mental trouble was much more serious than that to which the doctors for the defence had spoken. No evidence of a vacancy in a secure hospital was

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before the court. The judge, in passing sentence, said: "I am not going to have the responsibility of setting you anywhere near liberty. I am going to pass such a sentence on you as will involve you being entirely in the hands of the Secretary of State for Home Affairs, who has complete powers to send you to the right place."

B. M. Rees, for the appellant. It is apparent that the judge did not regard the case as one meriting punishment, but as one suitable for mental treatment. In those circumstances it was his duty to exercise his discretion by making a hospital order under section 60 of the Mental Health Act, 1959. All the requirements of that section were fulfilled, and the case clearly fell within that section.

The Attorney-General (*Sir Reginald Manningham-Buller, Q.C.*) and *J. R. Cumming-Bruce* as *amici curiae.* The judge had to consider the safety of the public as well as the treatment appropriate to the appellant. The only evidence of hospital treatment available was of such treatment in a local non-secure hospital, and the judge obviously felt that from the point of safety of the public that might be insufficient. In the circumstances, he had a discretion to impose the sentence which he did. The powers of the Secretary of State under section 72 of the Act are extremely wide and enable him to send the appellant at any time to the place which he regards in all the circumstances as most appropriate.

THE LORD CHIEF JUSTICE: This appellant was indicted at the Glamorgan Assizes for the murder of his wife, a lady seventy-two years of age. He was convicted of manslaughter on a plea of diminished responsibility, and was sentenced by Jones J. to life imprisonment. He now appeals against that sentence by leave of the court, the question being whether that sentence was wrong in principle having regard to the court's powers under the Mental Health Act, 1959.

So far as the facts are concerned, it is sufficient to say that this unfortunate husband killed his wife, who had been seriously ill. In many ways it could be classed as a mercy killing. The unchallenged evidence, so far as the defence doctors were concerned, was that the appellant was suffering from depression superimposed on a chronic anxiety state which had substantially impaired his mental responsibility. The doctors, who came within the definition of doctors qualified to speak on these matters under the Mental Health Act, 1959, gave evidence that he required mental treatment, and evidence was given that a vacancy was available in a local Welsh hospital. The learned judge, however, despite that being pressed upon him, sentenced the appellant to life imprisonment, saying: "I am not at all sure that your mental state is not even worse than that, at any rate, I am not going to have the responsibility of setting you anywhere near liberty. I am going to pass such a sentence on you as will involve you being entirely in the hands of the Secretary of State for Home Affairs, who has complete powers to send you to the right place."

It is agreed that under section 72 of the Mental Health Act, 1959, the Secretary of State has ample powers, but the argument is that, having regard to the court's powers under section 60, the court in its discretion ought to have dealt with the appellant under that section. So far as it is material, the section provides: "Where . . . (*a*) the court is satisfied, on the written or oral evidence of two medical practitioners (complying with the provisions of section sixty-two of this Act), (i) that the offender is suffering from mental illness . . . and (ii) that the mental disorder is of a nature or degree which warrants the detention of the patient in a hospital for medical treatment, . . . and (*b*) the court is of opinion"—and this is where the discretion of the court lies—"having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section, the court may by order authorise his admission to and detention in such hospital as may be specified in the order." By section 65 the court has power to make at the same time what is called a restriction order, which will restrict the discharge of the prisoner from hospital for such period as is stated in the restriction order except with the consent of the Secretary of State.

It seems to this court that although the discretion there laid down is very wide indeed, the basic principle must be that in the ordinary case where punishment as such is not intended, and where the sole object of the sentence is that a man should receive mental treatment and be at large as soon as he can safely be discharged, a proper exercise of the discretion demands that steps should be taken to exercise the powers under section 60, and that the matter should not be left to be dealt with by the Secretary of State under section 72. That, as it seems to the court, is the general principle. Of course there may be cases where, although there is a substantial impairment of responsibility, the prisoner is shown on the particular facts of the case nevertheless to have some responsibility for the act he has done, for which he must be punished, and in such a case, although, as the court reads the sentence imposed by the learned judge, this was not such a case, it would be proper to give imprisonment, allowing the Secretary of State to exercise his powers under section 72 in order that any necessary mental treatment should be given. Prima facie, therefore, it looks as if, as Mr. Rees has contended, this sentence was wrong in principle, in that it seems to this court that the learned judge was not intending to impose punishment. But what happened in the present case was this. The Crown sought to call rebutting evidence in regard to diminished responsibility, the form of the rebuttal being that the doctors for the Crown were going to say that the appellant was not merely suffering from diminished responsibility, but was insane within the M'Naghten Rules. However, not following the course taken by some judges, this learned judge in fact refused

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to allow that issue of insanity under the M'Naghten Rules to be raised. Nevertheless, the doctors for the Crown did give evidence which showed that they clearly thought that the degree of mental trouble from which the appellant suffered was a great deal more than that to which his own doctors had spoken. It seems to the court that the anxiety of the learned judge was really this, that he felt that the mental condition of this appellant might be far worse than that spoken to by his doctors, and that he ought to be kept in what one might call a secure hospital, where very special steps are taken to see that the inmate cannot get out and cannot be at large. Of course, there are hospitals which come within the meaning of the Act which are qualified for that purpose. We have been told that Moss Side, Rampton and Broadmoor are secure hospitals in that sense, but the only evidence before the learned judge was that there was a vacancy in a local Welsh hospital, and he was clearly not satisfied that that local Welsh hospital was secure enough to enable him to take the risk of making a hospital order naming that hospital. Accordingly, as the judge had no evidence of a vacancy in a secure hospital, it seems to this court that it was a perfectly proper exercise of his discretion in the special circumstances of this case to say: "Although I do not intend this as punishment, I am not going to take the responsibility of putting him in the local Welsh hospital where he can become at large, and I think it is better to leave it entirely to the Secretary of State." The court feels that there is no ground for interfering with the exercise of the judge's discretion. It certainly is not wrong in principle on the special facts of this case and, accordingly, this appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY,
MR. JUSTICE GORMAN, MR. JUSTICE SALMON AND
MR. JUSTICE STEVENSON

FREDERICK ALBERT SPURGE

1961
Feb. 27;
May 18

Road Traffic—Dangerous Driving—Defence of Mechanical Defect in Vehicle—How Far Available—Burden of Proof—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 11.*

So far as availability of the defence of mechanical defect in the vehicle in question to a charge of dangerous driving is concerned, there is no real distinction between a driver being suddenly deprived of all control of the vehicle by some sudden affliction of his person or being so deprived by some defect suddenly manifesting itself in the vehicle. Cases in which the defence of mechanical defect can successfully be relied on must be rare, and the defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver.

HILL *v.* BAXTER (1958) 42 Cr.App.R. 51; [1958] 1 Q.B. 277 and SIMPSON *v.* PEAT [1952] 2 Q.B. 24 approved.

Where mechanical defect can operate as a defence, the burden of establishing that defence does not lie on the prisoner. A court should not consider any such special defence unless and until it is put forward by the prisoner, but once it has been put forward, it must be considered with the rest of the evidence and if the defence then leaves a real doubt in the mind of the jury, the prisoner is entitled to be acquitted, and the jury should be so directed.

Appeal against conviction and sentence.

The appellant was convicted at Hampshire Quarter Sessions on September 27, 1960, of dangerous driving contrary to section 11 (1) of the Road Traffic Act, 1930, and was sentenced by the Deputy-Chairman (Arthur Phillips, Esq.) to a fine of £50 and disqualification for holding or obtaining a driving licence for twelve months.

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* Now replaced by the Road Traffic Act, 1960 (8 & 9 Eliz. 2, c. 16), s. 2 (1).

The following statement of facts is taken from the judgment.

On May 14, 1960, the appellant was driving a Ferrari sports car on a road between Havant and Hayling Island. As he was travelling round a very sharp and dangerous left-hand bend, his motor-car went over the double white lines in the middle of the road on to his wrong side of the road and there collided with an oncoming Lambretta motor-scooter.

Evidence was called on behalf of the prosecution to the effect that the appellant was attempting to negotiate the bend very much too fast. The case for the appellant was that he approached the bend at about thirty miles an hour and that on being warned by his passenger of its dangerous nature, he decided to go round the bend at a snail's pace; accordingly, he changed down from third to second gear and applied his brakes somewhat vigorously. This application of the brakes nearly wrenched the steering wheel out of his hands and pulled the car on to its wrong side of the road in such a fashion that it was impossible for him to control it. In his statement made to the police immediately after the accident, the appellant did not mention this loss of control and, indeed, denied that his motor-car had crossed the white lines in the middle of the road. Two expert witnesses were called on behalf of the appellant who had examined the motor-car about two months after the accident. They testified that the brakes were in very bad condition and that a vigorous application of the brakes at thirty miles per hour pulled the car fairly violently to its off side of the road. The appellant had taken delivery of the motor-car a few days before the accident and had driven it from Southampton to his home, a distance of about twenty miles. He had been told by the man from whom he had bought it that the brakes had been overhauled. He noticed, however, during the course of his twenty-mile drive home, that the brakes had what he described as a slight tendency to pull the car to the right.

A. K. Twaddle, for the appellant. The appellant's defence was that of a latent mechanical defect in his car, namely, the failure of the brakes to operate properly. There is no precise authority of the extent to which a defence of this kind is available on a charge of dangerous driving, but it is submitted that where the danger created by the movement of the car is not due to any fault on the part of the driver then the driver cannot be guilty of dangerous driving. The case of HILL *v.* BAXTER (1958) 42 Cr.App.R. 51; [1958] 1 Q.B. 277, which dealt with a sudden attack on or seizure suffered by the driver, is in point as showing that the liability of the driver is not an absolute one. Here the Deputy-Chairman did not adequately deal with the defence or put it fully before the jury and the summing-up contained misdirection on the burden of proof in relation to this offence. [He referred to various passages in the summing-up.]

H. J. M. Tucker (*Robert Hughes* with him) for the Crown. There is no authority for the proposition that a mechanical defect in a vehicle can afford a defence to a charge of dangerous driving in any circumstances. The *ratio decidendi* of HILL *v.* BAXTER (*supra*) was that if a driver of a motor-vehicle is subjected to a sudden attack either from some external agency or of illness which he had no reason to anticipate, he ceases for the time being to be driving the vehicle at all and therefore cannot be guilty of dangerous driving. In the case of a mechanical defect there is no question of the driver ceasing to drive at all and it is submitted, therefore, that the principles laid down in HILL *v.* BAXTER (*supra*) have no application to this case. Even if a mechanical defect can ever be a defence to a charge of dangerous driving, the burden of proving the defence must be on the accused, as the matter would be one

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particularly within his knowledge, OLIVER, 29 Cr.App.R. 137; [1944] K.B. 68, and therefore no complaint of the summing-up in this case can be made on this ground.

Cur. adv. vult.

May 18. The following judgment of the court was delivered:

THE LORD CHIEF JUSTICE: Salmon J. will deliver the judgment of the court.

SALMON J.: The appellant was convicted at Hampshire Quarter Sessions on September 27, 1960, of driving a motor-vehicle in a manner dangerous to the public, contrary to section 11 (1) of the Road Traffic Act, 1930. He was fined £50 and disqualified from driving for twelve months, and now appeals, by leave of this court, against conviction and sentence.

The facts of the case lie within a short compass. [His Lordship stated the facts as set out above, and continued.]

The appellant contended that he was not guilty of the offence charged because the danger created by his motor-car when it careered across the road and collided with the oncoming motor-scooter was due solely to the defect in its brakes and was in no way attributable to the manner in which he was driving. This case, therefore, raises a point hitherto undecided, namely, whether a mechanical defect can ever be relied upon as a defence to a charge of driving in a manner dangerous to the public, and, if so, what are the circumstances in which a mechanical defect can be so relied upon.

The Road Traffic Act, 1930, s. 11 (1), provides that: "If any person drives a motor-vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road," he commits an offence. If, on a prosecution under this section, the Crown proves that a motor-vehicle driven by an accused in fact endangers the public, that is strong evidence and, indeed, in any but the most exceptional circumstances, is likely to be regarded by the jury as conclusive evidence that the accused was driving in a manner dangerous to the public. If, however, a motor-car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame—if, for example, he suddenly has an epileptic fit or passes into a coma, or is attacked by a swarm of bees or stunned by a blow on the head from a stone, then he is not guilty of driving in a manner dangerous to the public. (HILL *v.* BAXTER (1958) 42 Cr.App.R. 51; [1958] 1 Q.B. 277.) It would be otherwise if he had felt an illness coming on but had still continued to drive, for that would have been a manifestly dangerous thing to do. It is true that in the examples given above it may be said that in a sense the man at the wheel was not driving at all, and therefore not driving dangerously. Indeed, that was the view expressed by the Divisional Court in HILL *v.* BAXTER (*supra*), a view with which this court entirely concurs. But it is also true that the sudden mischance suffered by the man at the wheel totally prevented him from controlling the movements of the motor-car, and that no fault of his in any way contributed to the danger. On that ground also, it seems to this court that even if the man at the wheel could in any sense be said to be driving, he would not be guilty of driving in a manner dangerous to the public. There does not seem to this court to be any real distinction between a man being suddenly deprived of all control of a motor-car by some sudden affliction of his person and being so deprived by some defect suddenly manifesting itself in the motor-car. In both cases the motor-car is suddenly out of control of its driver through no fault of his. Supposing a man is driving a motor-car at a slow speed close to his near side of a wide road, keeping a proper lookout and exercising all due care and skill, he is clearly driving in a safe manner. He turns the steering wheel to negotiate a gentle bend, but owing to a mechanical defect in the steering mechanism of which he has and could

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have had no knowledge, the steering suddenly fails completely and the wheel turns helplessly in his hands so that the motor-car careers across the road into an oncoming vehicle. In these circumstances clearly the motor-car endangers the safety of the member of the public driving the oncoming vehicle. Nevertheless, it could not truly be said that this danger was created by the manner of the driving of the motor-car which had gone out of control. There would be nothing in the driving which created the danger. It is quite true that if the motor-car had not been driven on the road, no danger to the public would have occurred. It is equally true that if the oncoming vehicle had not been on the road and no member of the public had been in the vicinity, there would have been no danger to the public. The driving of neither vehicle, however, would be the cause but the driving of each would be the occasion of the danger. As Lord Goddard C.J. said in SIMPSON *v.* PEAT [1952] 2 Q.B. 24, at pp. 27 and 28: "It is by no means impossible, and indeed must on occasions happen, that a situation of danger arises in which a motorist is involved but it cannot be said that he caused it by driving dangerously . . . whether the charge is under section 11 or section 12, the offence can be committed although no accident takes place; equally because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention; but if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own; in an endeavour to avert a collision he swerves to his right—it is shown that had he swerved to the left the accident would not have happened; that is being wise after the event and, if the driver was in fact exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another and perhaps more highly skilled driver would have acted differently."

The facts in SIMPSON *v.* PEAT (*supra*) were quite different from those in this case, but the principle enunciated by Lord

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Goddard is in point. This court desires to emphasise that cases in which a mechanical defect can successfully be relied upon as a defence to a charge of dangerous driving must be rare indeed. This defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor-car in such circumstances is manifestly dangerous. The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver.

It has been argued by counsel for the Crown that even if a mechanical defect can operate as a defence, yet the onus of establishing this defence is upon the accused. It is of course conceded by the Crown that this onus is discharged if the defence is made out on a balance of probabilities. In the opinion of this court, the contention made on behalf of the Crown is unsound, for in cases of dangerous driving the onus never shifts to the defence. This does not mean that if the Crown proves that a motor-car driven by the accused has endangered the public, the accused could successfully submit at the end of the case for the prosecution that he had no case to answer on the ground that the Crown had not negatived the defence of mechanical defect. The court will consider no such special defence unless and until it is put forward by the accused. Once, however, it has been put forward it must be considered with the rest of the evidence in the case. If the accused's explanation leaves a real doubt in the mind of the jury, then the accused is entitled to be acquitted. If the jury rejects the accused's explanation, the jury should convict. It has been suggested by counsel for the Crown that the onus of establishing any defence based on mechanical defect must be upon the accused because necessarily the facts relating to it are peculiarly within his own knowledge. The facts, however, relating to a defence of provocation or self-defence in a charge of murder are often peculiarly within the knowledge of the accused since often the only persons present at the time of the killing are the accused and the deceased. Yet once there is any evidence to support these defences, the onus of disproving them undoubtedly rests upon the prosecution. (WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App.R. 72; [1935] A.C. 462.) There is no rule of law that where the facts are peculiarly within the knowledge of the accused, the burden of establishing any defence based on these facts shifts to the accused. No doubt there are a number of statutes where the onus of establishing a statutory defence is placed on the accused because the facts relating to it are peculiarly within his knowledge. But we are not here considering any statutory defence. It is most important that the summing-up should contain a careful direction as to the onus of proof. It is equally important that the jury should be clearly told the narrow limits, laid down in this judgment, within which a defence based on sudden mechanical defect can operate.

Counsel for the defence has criticised the summing-up of the learned Deputy-Chairman on the grounds that the defence was not sufficiently put to the jury and that the direction as to the onus of proof was unsatisfactory. In the opinion of this court, however, it is unnecessary to consider these criticisms in detail, because on the evidence in this case it would have been impossible for the defence based on mechanical defect to have succeeded. The accused admitted that he was aware of the tendency of his motor-car to pull to the right when its brakes were applied. It was or should have been obvious to him that the more vigorously the brakes were applied the stronger this tendency would be. It was precisely this mechanical defect which, according to the accused, caused the accident. Even had the jury accepted the whole of the defence evidence, it would have been their duty to convict, for it was clearly dangerous for the accused to have driven his motor-car as he did with the knowledge which he possessed.

As to the appeal against sentence, this court considers that this was a bad case of dangerous driving and the sentence was very lenient. There is certainly no reason to reduce it. The appeals against conviction and sentence will, accordingly be dismissed.

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THE LORD CHIEF JUSTICE: I think the court should say that this appellant was disqualified from driving for twelve months. That disqualification was suspended by the court pending the determination of the appeal. Now that the appeal has been dismissed, his disqualification will revive.

Appeal dismissed.

Solicitors: Lesser & Co., for the appellant; R. V. Stokes & Co., Portsmouth, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ASHWORTH
AND MR. JUSTICE LAWTON

WILLIAM HENRY MARTIN

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Indictment—Amendment—Alleged Defect—Offence Disclosed in Depositions not Charged—Fresh Count Added Before Arraignment—No Prejudice or Embarrassment to Prisoner—Jurisdiction of Court—Indictments Act, 1915 (5 & 6 *Geo.* 5, *c.* 90), *s.* 5 (1).

By section 5 (1) of the Indictments Act, 1915, "Where before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice. . . ."

An indictment which charges offences not disclosed in the depositions and fails to charge an offence disclosed therein contains a latent defect which renders it defective within the meaning of the above subsection and accordingly capable of amendment just as much as if the defect had been a patent one.

Where a court is asked before arraignment of the prisoner to allow the addition of a new count to the indictment and is satisfied that no injustice will thereby be caused to the prisoner, the court has jurisdiction to sanction an amendment of this nature.

ERRINGTON (1922) 16 Cr.App.R. 148 and HUGHES (1927) 23 Cr.App.R. 4, considered.

It is doubtful whether after arraignment a new count can be added to an indictment in any circumstances.

Appeal against conviction.

The appellant was convicted at West Bromwich Quarter Sessions on January 3, 1961, of obtaining a motor-lorry and tyres by false pretences and was sentenced by the Recorder (E. Brian Gibbens, Esq.) to eighteen months' imprisonment and two years' imprisonment for other offences (concurrent) and three months' imprisonment (in respect of breach of probation, also concurrent).

The appellant was committed for trial on four charges, of which the two material to this report were: (i) obtaining a motor-lorry by falsely pretending that a cheque for £200 was a good and valid order for the payment of that sum, and (ii) obtaining sixteen tyres by falsely pretending that a cheque for £216 was a good and valid order for the payment of that sum. The bill of indictment followed the charges on which there had been a committal and was signed by the Clerk of the Peace in that form. Counsel for the prosecution, on being instructed, discovered that the indictment did not charge the real offence disclosed in the depositions in respect of this transaction, namely that of obtaining a motor-lorry and sixteen tyres by falsely pretending that a cheque for £378 was a good and valid order for the payment of that sum. He drafted a form of count to cover this offence, and a copy of the draft was given to the appellant's legal advisers, who were informed that an application would be made at the trial to amend the indictment by adding a count in this form.

At the trial, when the case was called on and before the appellant was arraigned, counsel for the prosecution applied to the Recorder for leave to amend the indictment by adding this count. The application was opposed by counsel for the defence. The Recorder granted the application, and defending counsel then applied that the indictment be quashed, but the Recorder refused to do so.

G. Green for the appellant. The Recorder had no jurisdiction to allow the count to be added. The indictment did not comply with section 2 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and therefore should have been quashed under subsection (3). In the first place, the indictment was not " defective " within the meaning of section 5 (1) of the Indictments Act, 1915, so as to be capable of amendment at all. Secondly, even if it was to be regarded as defective, there is no authority for allowing a new count to be added after the bill of indictment has been signed. The practice of allowing counts to be added to an indictment has been allowed by some judges and disallowed by others, but it is submitted that such authority as is to be found is against the practice. [He referred to ERRINGTON (1922) 16 Cr.App.R. 148 and HUGHES (1927) 20 Cr.App.R. 4.]

Max Holdsworth for the Crown. A court has jurisdiction to allow an amendment to be made to an indictment in the form of the addition of a new count, if the amendment is made before arraignment and if no injustice will be caused to the prisoner thereby. Here there is no suggestion of any injustice or embarrassment to the appellant. The indictment was defective within the meaning of section 5 (1) of the Act of 1915, in that it failed to charge the real offence disclosed on the depositions. The position in ERRINGTON (*supra*) was quite different, because in that case the prisoner had already been arraigned when the new count was added and obviously at that stage the amendment could not be made without injustice to the prisoner. The same position arose in HUGHES (*supra*) and the real issue in that case was whether the amendment caused injustice. Neither case is an authority for the proposition that a new count cannot be added to a defective indictment before amendment.

THE LORD CHIEF JUSTICE: This appellant, by leave of the court, appeals against his conviction at West Bromwich Quarter Sessions upon a count of an indictment charging him with obtaining a motor-lorry and sixteen tyres by false pretences. He has submitted that this count, which was added to the indictment by way of a purported amendment, had no effect in law, as the Recorder had no jurisdiction to make the amendment. He did not submit, nor on the facts could he have done, that the making of the amendment prejudiced or embarrassed him in any way.

The appellant had been committed for trial on four charges, one of which alleged that he had obtained a motor-lorry by falsely pretending that a cheque for £200 was a good and valid order for the payment of that sum; another charge alleged that he had obtained sixteen tyres by falsely pretending that a cheque for £216 was a good and valid order for the payment of that sum. At sessions a bill of indictment was drafted which followed the charges in the committal. This bill was signed by the proper officer of the sessions and became an indictment. At some stage after the drafting of the bill of indictment a brief to prosecute was delivered to counsel who, pursuant to his duty to the court to ensure that the indictment was correct in form, examined the copy indictment in his brief and discovered that the counts in it relating to the obtaining of the motor-lorry and the tyres did not charge the offence which was disclosed in the depositions, namely, the obtaining of a motor-lorry and sixteen tyres by means of a worthless cheque for £378. There had not been two obtainings by means of two cheques but only one obtaining by means of one cheque which was drawn and handed to the loser some time before the two cheques mentioned in the indictment came into existence. By the time this error was discovered the bill of indictment had become an indictment. Probably no error at all would have been made if counsel briefed to prosecute had been instructed to draft the indictment. We are of the opinion that in all cases of difficulty this should be done. On discovering the error, counsel drafted a form of count founded on the facts disclosed in the depositions. A copy of this draft was given to the appellant's legal advisers, who were told that at sessions an application would be made to amend the indictment by adding this count.

At sessions, when the case was called on and before the appellant was arraigned, counsel applied to amend the indictment by making this addition. The application was granted by the Recorder. Thereupon counsel for the appellant, who had resisted the application to amend and was mindful of the provisions of section 2 (3) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, applied that the indictment be quashed, but the Recorder refused to do so.

Such jurisdiction as the Recorder had to allow the addition of this count to the indictment came from section 5 (1) of the Indictments Act, 1915, which provides as follows: "Where before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice." In the circumstances of this case the amendment, if there was jurisdiction to make it at all, could have been made without injustice. It follows that the only question is whether the indictment was defective. If it was, the Recorder had jurisdiction to allow the amendment; if it was not, he had none.

It is pertinent to remember that before the Indictments Act, 1915, courts of assize and quarter sessions had only limited powers to amend indictments. These powers were derived from a number of statutes which were repealed by that Act, which was not a consolidating one. As this court

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stated in Smith (1950) 34 Cr.App.R. 168, at p. 176: "this enactment . . . was passed mainly for the purpose of doing away with the technicalities and redundancies of pleading in criminal cases." It was clearly the intention of Parliament that the powers of amendment should be very considerably extended.

An indictment which charges offences which are not disclosed in the depositions and fails to charge an offence which is lacks the most essential quality of an indictment. It makes an accusation of crime without cause when it should have made one with cause. This is what the indictment under consideration in this appeal did before it was amended. In our opinion, this indictment contained a latent defect which made it just as much defective within the meaning of section 5 (1) as if the defect had been a patent one. In Smith, *supra*, at p. 176, this court rejected the argument that any indictment to be defective must be one which in law did not charge any offence at all and therefore was bad on its face. Humphreys J. who delivered the judgment of the court, went on to say: "In our opinion, any alteration in matters of description, and probably in many other respects, may be made in order to meet the evidence in the case so long as the amendment causes no injustice to the accused person." The amendment in this case was made for the purpose of meeting the evidence disclosed on the depositions and no injustice was done to the appellant.

We were referred to a number of cases in which this court has considered whether the powers of amendment given by section 5 (1) have been properly used. None dealt with the exact situation which arose in this case. We were informed, however, that the practice of allowing counts to be added to an indictment before arraignment has been allowed by some judges and rejected by others. In Errington (1922) 16 Cr. App.R. 148, a new count, charging wholly new false pretences, was added after the appellant had been arraigned and had pleaded not guilty. The reasons for the making of the amendment are not stated. The court adjudged that the amendment was an irregularity for two reasons, firstly, it was not made because the indictment was defective and, secondly, it was one which could not, at that stage, be allowed without injustice. For the reasons already given, we are of the opinion that the indictment in this case was defective and it was never submitted that the amendment, which was made before arraignment, caused any injustice to the appellant. In our opinion, ERRINGTON's case (*supra*) is not an authority supporting the proposition that a count of an indictment cannot in any circumstances be added by way of amendment before arraignment.

In HUGHES (1927) 20 Cr.App.R. 4, there is a paragraph in the judgment of the Lord Chief Justice, Lord Hewart, at p. 8, which appears on first reading to be against the view which we are taking in this judgment. HUGHES' case (*supra*) was one in which at the close of the prosecution's case the judge allowed all the counts for false pretences to be amended by the substitution of another alleged false pretence for those stated in the indictment. The court was of the opinion that such an amendment at that stage of the trial could not be made without injustice. As the court in HUGHES' case (*supra*) were considering whether the amendment caused injustice rather than the question whether, having regard to the evidence disclosed on the depositions, the indictment was defective, we do not consider that Lord Hewart's observations are relevant to a situation and problem which are wholly different.

We appreciate that no case has been reported which approves the adding of a new count before arraignment and by way of an amendment, but nevertheless we consider that there is no objection in principle to this being done provided it can be done without injustice.

This judgment is not intended to encourage the adding of counts to indictments by way of amendment. Indictments which have been carefully drafted should require no amendments of this kind. Unless a defendant has ample warning

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of an intention to apply for a count to be added, the probabilities are that the addition cannot be made without injustice. After arraignment it is doubtful whether a new count can be added at all, as the defendant will not have pleaded to it nor, if the trial has started, have been put in charge of the jury on it; and if it were made, injustice, as the cases of ERRINGTON (*supra*) and HUGHES (*supra*) show, would almost certainly be caused. When, however, the court which is asked before arraignment to allow the addition of a new count is satisfied that no injustice will be caused to the defendant, we can see no reason why such an amendment of the indictment should not be made.

The appeal will be dismissed.

Appeal dismissed.

Solicitors: Hand, Morgan & Owen, Stafford, for the Crown.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE SALMON AND
MR. JUSTICE ELWES

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Sentence—Preventive Detention—Motoring Offence—Driving under Influence of Drink—Bad Record for Motoring Offences.

A sentence of preventive detention is not excluded as a possible sentence for a motoring offence such as driving when under the influence of drink, but the occasions on which such a sentence is appropriate for such an offence must be exceedingly rare.

Sentence of two years' imprisonment substituted for a sentence of eight years' preventive detention for an offence of driving when under the influence of drink, where the appellant, though having a very bad record for motoring offences, had not

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hitherto undergone a longer period of imprisonment than sixteen months, a sentence of six months' imprisonment for driving when disqualified (arising out of the same incident) being affirmed and ordered to run consecutively.

Appeal against sentence.

The appellant pleaded Guilty at Middlesex Sessions on February 15, 1961 to driving when under the influence of drink and to driving when disqualified and was sentenced by the Deputy-Chairman (Harold Williams, Esq., Q.C.) to eight years' preventive detention and six months' imprisonment (concurrent).

The appellant had an extremely bad record for motoring offences, including three previous convictions for driving when under the influence of drink, but had not hitherto been sentenced to a longer term of imprisonment than sixteen months.

T. H. K. Berry for the appellant. A sentence of preventive detention should be regarded as being generally inappropriate to this type of offence, though it is not contended that in no circumstances would such a sentence be proper for such an offence. What makes the sentence inappropriate in the present case is that the appellant, despite his bad record for motoring offences, has never hitherto received a longer sentence than one of sixteen months' imprisonment and the difference between sixteen months and eight years is far wider than the gap which would normally be found between a previous sentence of imprisonment and a sentence of preventive detention. The court had power to impose on the appellant a sentence of imprisonment substantially longer than the longest term he had previously served without resorting to preventive detention. Though a court might have hesitated in this case to pass consecutive sentences in view of the fact that both offences arose out of the same incident, consecutive sentences would have been possible and in that event the term of imprisonment might have extended to thirty months. Further, having regard both to the appellant's record and the facts of the case, the worse offence of the two was really that of driving when disqualified, for which the maximum term of imprisonment was six months, and it was wrong in principle, when a sentence of preventive detention could not have been passed for that offence, to attain the same end indirectly by passing that sentence for the other offence.

ASHWORTH J. This appellant, Henry Smith, pleaded guilty at Middlesex Sessions to driving while under the influence of drink and to driving while disqualified, and he was sentenced to eight years' preventive detention on the first charge and to six months' imprisonment on the second, six months being the maximum that it was open to the court to pass for the offence of driving while disqualified. He now appeals against sentence with the leave of this court.

As driving records go, this appellant's record must be about as bad as anyone's could be in the sense of deliberate flouting of the law. It is, perhaps, worth cataloguing his offences. In February 1952 he was convicted of driving while under the influence of drink, fined £5 and disqualified for twelve months. In May 1953 for a similar offence, and one of dangerous driving, he was disqualified from driving for ten years. In 1954 there was a different form of motoring offence: he stole a van as bailee, and he was put on probation for two years. In June 1954 he was convicted of aiding and abetting a disqualified driver to drive and of permitting an uninsured vehicle to be used, for which he received three months' imprisonment and was fined £10 or one month in lieu. In July 1955 he was convicted of stealing a car and stealing a van and also of two cases of forgery for which he was sentenced to nine months' imprisonment concurrent and six months consecutive. In October of the same year, 1955, he was convicted of driving whilst disqualified and driving whilst uninsured, and was sentenced to six months' and three months' imprisonment concurrent with the sentence passed in July. Fifteen months later, in December 1956, he was convicted of using an unlicensed vehicle and fined £4. In October 1957 he was convicted of permitting an uninsured vehicle to be used and sentenced to three months' imprisonment and disqualified for twenty-one years. In the same month he was convicted of driving while disqualified and he was sentenced to six months' imprisonment consecutive to the previous sentence and disqualified for the same period, twenty-one years. In January 1958 he was again convicted of driving whilst disqualified and was sentenced to six months' imprisonment consecutive to the previous sentence. In November 1958 he was convicted of driving when under the influence of drink and he was disqualified for life from driving and sentenced to sixteen and sixteen months' imprisonment concurrent. In December 1959 he stole a wheel and a tyre and was fined £20. In January 1960 he was convicted of aiding and abetting the use of a motor-vehicle with no "L" plates and fined £20, and in May 1960 he was again convicted of driving whilst disqualified, driving with no insurance and aiding and abetting a disqualified driver (two cases), for which he was sentenced to three months' and six months' imprisonment concurrent. That really is an appalling record. It shows a deliberate and persistent disregard of the order of the court disqualifying him from driving, and it also includes no less than three occasions of offences of driving when under the influence of drink. The learned Deputy-Chairman viewed this case as one in which the time had come to protect the public. It is not merely a case of a man driving whilst disqualified; the appellant is unhappily addicted to drink, and on the date when the current offences were committed, as his counsel has frankly admitted, he was not merely under the influence of drink, but was drunk, and the danger of a drunken driver on the road needs no elaboration from this court. It is not altogether surprising that in those circumstances the learned Deputy-Chairman felt that he was in duty bound compelled to impose a sentence of preventive detention so that the public should be protected from the appellant.

On his behalf Mr. Berry has urged everything that could be said. He takes, first of all, the point that for this class of offence a sentence of preventive detention is in the nature of

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things inappropriate. It is, no doubt, true that the occasions on which a sentence of preventive detention for this type of offence can be properly passed must be exceedingly rare, but it would not be right, nor indeed did Mr. Berry contend the contrary, to say that in no circumstances can a sentence of preventive detention apply when a man has a record of this sort. The relevant statutory provision contains no limitation as to the class of offence for which preventive detention may be passed and, in the opinion of this court, there is no sound reason for excluding the possibility of that type of sentence being passed for offences such as those to which this appellant pleaded guilty.

Secondly, Mr. Berry contended that so far the longest sentence which the appellant has had to undergo is one amounting in all to sixteen months' imprisonment, and that, no doubt, is a factor of importance. As he puts it, the difference between sixteen months to date and eight years which has now been imposed is a wider gap than would normally be found when a court decides to impose preventive detention. Moreover, as he points out, it would be possible to impose upon the appellant without sending him to preventive detention a term of imprisonment which is substantially longer than the longest of the two which he has undergone. The maximum sentence for driving while under the influence of drink is two years and driving while disqualified is six months. In the view of this court, that second maximum, namely, six months, is one which on the facts of this case calls and calls loudly for the consideration of those responsible for dealing with these matters. If ever a man deserved by his persistent driving while disqualified a longer term of imprisonment for the mere fact of driving while disqualified, then this is the man.

The third point that was taken, and there is substance in it, is that on his record and on the facts the more serious offence in the sense of the two to which he pleaded guilty, was the driving, because he had been disqualified for life. He should never have been on the road that evening at all, and he knew it. What is said is that it is wrong in principle for a court which cannot pass a sentence of preventive detention for driving while disqualified to reach the same end by passing it for the offence of driving while under the influence of drink. The learned Deputy-Chairman, after passing sentence, made this observation: "Mr. Berry, you will need no help, but it is right to say that we should appreciate the views of the Court of Criminal Appeal as to what we have done." I have endeavoured to summarise the views of this court, namely, that preventive detention is not excluded as a possible sentence in an appropriate case, but the occasions on which such a sentence is likely to be passed are exceedingly rare. The view of this court is that in the circumstances, having regard to the fact that this appellant had not undergone a term longer than sixteen months, the time had not been reached, so far as the appellant is concerned, for preventive detention; but no doubt the appellant will realise himself, and those appearing for him will make sure that he does, that if any further incident of this sort occurs, it would make it almost incumbent on the court that deals with him to pass a sentence of preventive detention; in other words, the time has now come after the sentence which this court is about to substitute.

One matter which has caused this court some concern is whether in the circumstances it would be right to make the sentences on the two offences consecutive since they arise out of the same matter. This court takes the view that they are essentially different offences, although they arise out of the same matter. The driving by the appellant was something which he had been forbidden to do ever again, and yet he drives and the drink element was something fortuitous that evening. It was quite shocking. Having considered the matter carefully, this court takes the view that it is possible and right to pass consecutive sentences, and it is only fair to Mr. Berry to say that, while not assenting to that course, he did not seriously contend that it would be inappropriate. The result is that this appeal will be allowed, and in lieu of the sentence

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of eight years' preventive detention on the drink charge there will be substituted a sentence of two years' imprisonment, which will be consecutive to six months' imprisonment for the other offence, which will stand.

Sentence varied.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE SALMON AND MR. JUSTICE ELWES

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JAMES ELLIS
RICHARD SIDNEY ELLIS

Previous Conviction—Cross-Examination of Prisoner—Evidence by Prisoner against Co-Prisoner Charged with Same Offence—Evidence Properly Admitted—Defence of Co-Prisoner Subsequently Abandoned—No Application for Discharge of Jury—Duty of Court—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*), *exception* (iii).

Where cross-examination of a prisoner on his character or previous convictions becomes admissible by reason of the fact that " he has given evidence against any other person charged with the same offence " under exception (iii) to section 1 (*f*) of the Criminal Evidence Act, 1898, there is no overriding discretion in the court to allow or disallow such cross-examination. Cross-examination in such circumstances is a matter of right and not of discretion.

MILLER (1952) 36 Cr.App.R. 169 referred to.

Three prisoners, the two appellants and one G., were charged with warehousebreaking and larceny and, alternatively, with receiving. All three pleaded Not Guilty, the two appellants being defended by one counsel and G. by a different counsel. Two police officers, who were keeping observation opposite the warehouse, saw the two appellants arrive in a motor-car, and shortly afterwards a van driven by G. appeared. According to the police, the appellant J. E. and G. were removing articles from the warehouse and putting them in the van, while the appellant R. E. kept watch. Counsel for G. suggested to the police in cross-examination that G. had no real part in the offence, but had merely hired the van to J. E. at his request. This was denied by the police. J. E. gave evidence first for the defence and stated in his examination-in-chief that G. had told him that he had bought some bankrupt stock and wanted J. E. and R. E. to help him to move it. J. E. was subsequently, by permission of the judge, cross-examined on his previous convictions by G.'s counsel.

Held, that having regard to the defence of G. as indicated at that stage, the evidence given by J. E. was properly held to be evidence against G. and that the cross-examination of J. E. was accordingly properly admitted under exception (iii).

Later in the trial, G. pleaded Guilty to receiving, but the prosecution were not prepared to accept that plea and the trial proceeded on the charges of warehousebreaking and larceny. G. gave evidence and, in addition to admitting his guilt on the charge of receiving, admitted in cross-examination by counsel for the appellants that he might have told J. E. that he had acquired some bankrupt stock. No application for discharge of the jury was made by counsel for the appellants.

Held, that, in view of the abandonment of G.'s defence, it would have been the duty of the judge to discharge the jury and order a re-trial if an application to that effect had then been made by counsel for the appellants; but that in the present case, as there had been no irregularity in the admission of the cross-examination of J. E. on his previous convictions at the time when this occurred and no application for discharge of the jury when the altered circumstances arose, the convictions of the appellants could not be set aside.

WATTAM (1941) 28 Cr.App.R. 80 referred to.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court on January 16, 1961, of warehousebreaking and larceny and receiving and were sentenced by the Commissioner (His Honour Judge Block) each to four years' imprisonment.

On December 5, 1960, police officers were keeping observation opposite the warehouse named in the indictment and saw the two appellants arrive in a motor-car. Soon afterwards, a van driven by Gamble (who was indicted together with the appellants) appeared. According to the police, James Ellis and Gamble removed articles from the warehouse to the van, while Richard Ellis kept watch. The two appellants were represented by one counsel and Gamble by another counsel. Counsel for Gamble suggested in cross-examination to the police officers that Gamble had no real part in the offence, but had merely hired the van to James Ellis at his request. This the police denied. James Ellis gave evidence first for the defence and stated that Gamble had told him that he had bought some bankrupt stock and requested him and Richard Ellis to help him to move it. After James Ellis had concluded his evidence-in-chief, counsel for Gamble applied to the judge for leave to cross-examine James Ellis on his previous convictions, on the ground that the evidence he had already given amounted to evidence against Gamble and that he had, accordingly, brought himself within exception (iii) to section 1 (*f*) of the Criminal Evidence Act, 1898. The judge ruled that such cross-examination was permissible, and James Ellis was then cross-examined on his previous convictions. On the next day, Gamble admitted his guilt on the charge of receiving, but the prosecution were unwilling to abandon the charge of warehousebreaking, and the trial on those charges against him and on all the charges against the appellants proceeded. Gamble gave evidence and, in addition to admitting his guilt in respect of the receiving, admitted in cross-examination by counsel for the appellants that he might have told James Ellis that he had acquired some bankrupt stock. No application for discharge of the jury was made by counsel for the appellants.

P. B. Pollock for the appellants. It is submitted that the cross-examination of James Ellis on his previous convictions was wrongly admitted. His evidence-in-chief was not sufficiently definite to amount to evidence against Gamble, and in any event the judge should, in the exercise of his discretion, have refused to admit the cross-examination. Further, even if at that stage, in view of the defence which Gamble then indicated, the evidence given by James Ellis did amount to evidence against Gamble, the position was completely altered when Gamble pleaded guilty to receiving and further admitted in cross-examination a substantial part of the story told by James Ellis. The judge should have stopped the case at that stage and directed a retrial before another jury. It was contrary to the interests of justice that the trial should have been allowed to proceed on a false basis, when great prejudice to the appellant James Ellis had been wrongly created. Further, the reference to James Ellis' previous convictions in the summing up was most unfortunate and should not have been made.

Brian L. Leary for the Crown. The cross-examination was rightly admitted in the first instance. The evidence given by James Ellis in chief did inculpate his co-prisoner Gamble. [He referred to HADWEN [1902] 1 K.B. 882.] The position certainly became entirely different following on Gamble's change of plea and it may be that, if at that stage the judge had been asked to discharge the jury, he would have been bound to accede to the application, but no such application was made, and it cannot, therefore, be said that any irregularity occurred. The passage in the summing-up which has been criticised was not unfair or prejudicial to James Ellis, having regard to its context.

Cur. adv. vult.

June 12. The judgment of the court was read by ASHWORTH J. These two appellants were charged, together with a man named Gamble, on an indictment containing seven counts, of which only the first five are material. In count 1 all three were charged with breaking and entering a warehouse and stealing groceries therein, the date being early November 1960. In count 2 there was a similar charge against all three, the date being early December 1960. In count 3, all three men were charged with receiving 304 cartons of grocery provisions early in December 1960, knowing them to have been stolen. Count 4 contained a separate charge of receiving against the appellant James Ellis and count 5 a separate charge of receiving against Richard Ellis.

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The trial took place at the Central Criminal Court on January 12 and 13, 1961, before His Honour Judge Block, and at the trial Gamble was separately represented by counsel, the two appellants being jointly represented by Mr. Pollock of counsel.

On December 5, 1960, police officers were keeping observation opposite the premises in question when they saw the two appellants arrive in a black Austin motor-car. Shortly afterwards a van appeared driven by Gamble. According to the police, the appellant James Ellis and Gamble were seen to be removing articles from the warehouse and putting them in the van, while the appellant Richard Ellis kept watch.

In the course of the case for the prosecution, on two separate occasions, counsel appearing for Gamble asked questions in cross-examination suggesting to the police officers concerned that Gamble had no real part in the raid, but had merely hired the van at the request of the appellant James Ellis. The question on the first occasion was as follows: "I suggest the position is that as you say, Gamble drove up in the van, and he afterwards left immediately, did he not?" The answer was "No, Sir." On the second occasion, after the police officer had deposed that Gamble had said "I agree I hired the van," counsel suggested that Gamble added, "because my brother-in-law wanted to move some gear." Again, the answer was "No, Sir."

James Ellis was the person first named in the indictment and gave evidence after the close of the case for the prosecution. He said that he visited Gamble's home on December 4, and the following questions and answers appear in the transcript: "(Mr. Pollock): While you were there was any suggestion made? (A.) Yes. (Q.) What was that? (A.) Apparently Mr. Gamble bought some bankrupt stock. . . . (Q.) Is this what he told you? (A.) Yes. (Q.) That he had bought some bankrupt stock? (A.) Yes. (Q.) Where did he say he got it from? (A.) He did not say where; he had just bought it in a deal, and he asked me and my brother if we would help him to move it on the Monday morning. (Q) The following day? (A.) Yes."

After James Ellis had given evidence-in-chief, counsel appearing for Gamble applied to the learned judge for permission to cross-examine James Ellis on his criminal record on the basis that James Ellis had given evidence against a co-prisoner charged with the same offence. After hearing argument, the learned judge ruled that such cross-examination was permissible. In passing, it may be worth mentioning that at the hearing of the appeal the question arose whether there was any discretion in the court to permit or disallow such cross-examination, assuming that the evidence given by James Ellis had prima facie exposed him to it. In the opinion of this court, in such circumstances there is no overriding discretion in the court to allow or disallow such cross-examination; if the facts bring the matter within the relevant statutory exception, such cross-examination is a matter of right and not of discretion. For a discussion of the principles involved see MILLER (1952) 36 Cr.App.R. 169.

The first ground of appeal put forward by the present appellants is that in the circumstances the cross-examination was wrongly permitted. The words of the exception, to be found in section 1 (*f*) (iii) of the Criminal Evidence Act, 1898, are: "He has given evidence against any other person charged with the same offence." Those words were considered in HADWEN [1902] 1 K.B. 882, and in the judgment reference is made to evidence incriminating or inculpating a fellow prisoner. It is right to point out that the issue in that case was not whether evidence against any other person charged with the same offence had been given, but what the consequences of such evidence would be.

The question whether evidence by a prisoner brings him within the exception depends primarily upon the nature of the evidence, having regard to the issues involved. It is sufficient in this case to say that, having regard to the defence of Gamble as indicated at that stage of the trial, namely, that he was not present for more than a moment and then only as a person who had been asked to hire a van for the appellant James Ellis, the evidence given by James Ellis was properly held by the learned judge to be evidence against Gamble. Accordingly, cross-examination as to James Ellis's criminal record was properly permitted.

On the following day of the trial there was a surprising development, as Gamble by his counsel informed the court he wished to plead guilty to the charge of receiving contained in count 3. Counsel for the prosecution was unwilling to drop either of the charges of breaking and entering and stealing, and accordingly the trial proceeded. When Gamble gave evidence he frankly admitted his guilt on the receiving charge, but he went even further, in that when cross-examined by Mr. Pollock for the appellants he admitted that he might have told James Ellis that he had acquired some bankrupt stock.

It cannot be supposed that counsel appearing for Gamble had the slightest idea, when he applied to cross-examine James Ellis on his past record, that the defence theretofore put forward on behalf of Gamble would be abandoned. But it was in fact abandoned, and the unfortunate result was that the jury had been made aware of James Ellis's record when, as subsequent events showed, it was unnecessary and indeed most undesirable that they should know anything about it.

In this situation the problem arises whether the trial should have been allowed to proceed before that jury. In the opinion of this court, while it was not incumbent upon the learned judge to stop the case and order a retrial before another jury, an application by counsel for the Ellis brothers (if made) should have been upheld. No such application was made, but this court does not wish thereby to imply any criticism of Mr. Pollock, who defended the Ellis brothers at the trial and in this court with great persistence and ability. It was for him a complete surprise and his omission to apply for the discharge

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of the jury is understandable. But so far as this court is concerned, the fact that the trial proceeded when it might have been stopped does not afford a ground on which the verdict can be set aside. A somewhat similar issue arose in WATTAM (1941) 28 Cr.App.R. 80, but in that case there had been some irregularity and even then this court held, following its earlier decisions, that in the absence of an application to discharge the jury the verdict must be upheld. In the present case this court holds that there was no irregularity in the admission of the evidence and, accordingly, there is stronger reason than existed in the case cited for upholding the verdict.

The last point put forward on behalf of the appellants arises out of the reference made by the learned judge in his summing-up to the evidence regarding James Ellis's criminal record. He said this: " It is perhaps unfortunate in a way that the character of James Ellis had to be put before you, and you will approach that not in the light that because he has been convicted before he committed this offence, but you will approach it in the light as to whether in the circumstances you can regard him as a truthful witness." Taken out of their context, those words would in the circumstances of this case be open to criticism, but they were followed immediately by a passage in which the learned judge contrasted the evidence given by the two appellants, which was on a material point conflicting. Once it is appreciated, first, that the evidence as to James Ellis's criminal record was rightly admitted and was before the jury, and secondly, that there was no objection to the continuation of the trial before that jury, the comments made by the learned judge were legitimate and their purpose was clearly directed in the first place to the inconsistencies between the two appellants' stories.

For these reasons, this court is of opinion that no ground has been put forward which calls for an interference with the verdict. In these circumstances, it is unnecessary to express any concluded view on the question whether in any event it

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would have been right to set aside the verdict in respect of Richard Ellis, whose character was not attacked at all.

Appeals dismissed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE SALMON AND MR. JUSTICE ELWES

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GERALD SEIGA

Photograph—Identifying Witness—Showing by Police after Arrest—No Identification Parade Held—No Reference to Photograph in Summing-up.

After the arrest of the appellant, a group of photographs, including a photograph of the appellant, was shown by a police officer to a witness subsequently called to identify the appellant. No identification parade was held after the arrest of the appellant, and a considerable time elapsed between the date when the photograph was shown to the witness by the police and the date when she was called to identify the appellant in court.

Held, that while the court disapproved of the conduct of the police officer in showing the photograph in such circumstances, that conduct did not afford sufficient ground for quashing the conviction.

Goss (1923) 17 Cr.App.R. 196 and Haslam (1925) 19 Cr. App.R. 59 distinguished.

It is a matter for the discretion of the judge in each case whether to give a direction on the possible effect of the showing of the photograph on the reliability of the identifying witness.

Appeal against conviction.

The appellant was convicted at Lancashire Quarter Sessions on January 13, 1961, of receiving stolen property and was sentenced by the Chairman (W. H. Openshaw, Esq.) to three years' imprisonment.

The stolen property, a tape recorder, was sold by the appellant to a Mr. Kavanagh on November 9, 1960. On November 28, 1960, the appellant was arrested on charges of housebreaking and stealing, and alternatively of receiving, other property which he had sold to Mr. Kavanagh at the same time. On these charges he was acquitted at the trial. On November 29, 1960, a detective constable visited Mrs. Kavanagh, who had been present together with her husband at the purchase, and showed her nine photographs, including a photograph of the appellant. She picked out the photograph of the appellant as that of the man who had sold her the tape recorder and the other property. No identification parade was held after the arrest of the appellant, and about three weeks elapsed between the time when Mrs. Kavanagh had seen the photograph and the time when she identified the appellant at the magistrates' court. Mr. Kavanagh, who had not been shown any photographs, also gave evidence identifying the appellant as the vendor of the tape recorder. The Chairman made no reference in his summing-up to the fact that Mrs. Kavanagh had been shown a photograph of the appellant.

A. Carus for the appellant. The showing of the photographs to Mrs. Kavanagh after the appellant had been arrested was entirely irregular and contrary to the decisions of this court in Goss (1923) 17 Cr.App.R. 196 and HASLAM (1925) 19 Cr.App.R. 59. It considerably diminished the value of Mrs. Kavanagh as a reliable witness with regard to identification, and a further ground of complaint is that the Chairman gave the jury no warning on this matter.

G. J. Bean for the Crown. It is conceded that the conduct of the detective constable in showing the photographs to Mrs. Kavanagh is to be deprecated, but this case can be distinguished from those cited on behalf of the appellant by reason of the fact that in the present case the witness did not afterwards attend an identification parade. [Ashworth J. Was there any reason for no identification parade being held in this case, or is there any explanation for the detective constable having shown the photograph in those circumstances?] It is regretted that the Crown is not in a position to answer either of those questions. Further, no objection was taken either before the examining justices or at the trial to the admission of the evidence with regard to the photographs, and there was in addition to the evidence of Mrs. Kavanagh the evidence of Mr. Kavanagh as an identifying witness. If the Chairman had referred to the photographs in his summing-up, it might have been worse for the appellant and an indication to the jury that he had previous convictions.

At the close of the arguments Ashworth J. said that the appeal would be dismissed and that the court would give its reasons at a later date.

Cur. adv. vult.

June 12. The judgment of the court was read by ASHWORTH J. This appellant was charged at Lancashire Quarter Sessions on an indictment containing three counts. The first two counts related to a television set, and it was alleged in the first count that he broke and entered the dwelling-house of Norah Corkhill and stole a television set, and in the second count, alternatively, that he received it knowing it to have been stolen. At the close of the case for the prosecution it was successfully submitted on behalf of the appellant that there was no case for him to answer on the first two counts, since Mrs. Corkhill had failed to give any satisfactory evidence to prove that the set in question was hers. The third count charged the appellant with receiving a tape recorder, knowing the same to have been stolen, and he was convicted on that count and sentenced to three years' imprisonment. He appealed to this court with the leave of the court and the appeal was heard on June 6 and was dismissed; this judgment contains the reasons why the appeal was dismissed.

The relevant dates are of some importance. The tape recorder was stolen from the shop of one Whitehead on November 7, 1960, and on November 9 according to a Mr. and Mrs. Kavanagh the appellant sold that tape recorder to Mr. Kavanagh. The appellant was arrested on November 28 on the charges which eventually appeared in the first two counts of the indictment. It is only right to mention that the appellant was said to have sold the television set involved in those two counts to the same purchasers, so that Mr. and Mrs. Kavanagh were material witnesses on all three counts. On November 29 a detective constable visited Mrs. Kavanagh and showed her nine photographs, one of which was a photograph of the appellant, and it appears that without hesitation she picked out a photograph of the appellant as the man who had sold both the television set and the tape recorder to her husband. Some three weeks later the appellant appeared before the justices and was committed for trial and the trial itself took place on January 12 and 13, 1961.

The main ground put forward on behalf of the appellant was that the conduct of the detective constable in showing Mrs. Kavanagh photographs of the appellant after he had been arrested was in conflict with well-established practice and principles declared in previous judgments of this court. In particular, reliance was placed upon the decisions in GOSS (1923) 17 Cr.App.R. 196 and HASLAM (1925) 19 Cr.App.R. 59. In both those cases the photographs in question were shown to the witness after the accused man had been arrested but before an identification parade, and in both those cases this court condemned the practice. In the present case there was no identification parade after the appellant had been arrested, so that the case does not fall directly within the decisions in GOSS (*supra*) and HASLAM (*supra*).

Counsel for the prosecution was asked in the course of the hearing of the appeal whether there was any reason why there should not have been an identification parade in this case, and he was further asked whether he had any explanation to offer

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why the detective constable should have shown the photographs to Mrs. Kavanagh after the appellant had been arrested on charges in which her evidence would be required. Counsel was not in a position to supply an answer to either question, and this court in the absence of any explanation cannot but regard the conduct of the detective constable as unsatisfactory. If the only evidence identifying the appellant as having sold the tape recorder on November 9 had been that of Mrs. Kavanagh, this court might well have felt it right to allow the appeal, but in fact Mr. Kavanagh gave evidence identifying the appellant as the man who had sold him both the television set and the tape recorder, and in the light of the evidence as to the negotiations for sale, it is obvious that Mr. Kavanagh had ample opportunity of seeing and remembering the features of the man who was selling the articles to him. Moreover, it is to be noted that there was a substantial gap in time between the date when Mrs. Kavanagh saw the photographs and the date when she was called upon to identify the appellant in court, and her evidence of identification was accordingly less coloured by the recollection of the photograph than would have been the case if she had attended an identification parade on the following day. It may also be noted that no objection was taken on behalf of the appellant to the admission of the evidence as to the photographs either before the committing justices or at the trial.

While the court disapproves of the conduct of the detective constable, that conduct does not in the opinion of the court afford sufficient ground for setting aside the conviction.

A further point taken on behalf of the appellant was that the learned Chairman should have warned the jury that Mrs. Kavanagh's evidence should be considered with all the more care having regard to the fact that she had seen a photograph of the appellant. It was further said that any reference to the photographs in the possession of the police would convey to the jury the impression that the appellant had a criminal record. The necessity for any such warning was disclaimed by

Humphreys J. giving the judgment of this court in HINDS, 24 Cr.App.R. 6; [1932] 2 Q.B. 644, and the matter has been very recently considered by this court in LAWRENSON [1961] Crim.L.R. 398, March 6, 1961. Both points were raised by counsel appearing for the appellant in the last-mentioned case, and in the course of giving judgment the Lord Chief Justice said: "In the judgment of the court, it must be left to the discretion of the judge in every case whether to give such a direction or not. There may be many cases, and it looks as if this may well be one, in which to warn the jury would be to make matters much worse from the prisoner's point of view, in that this jury may well not have realised that the photographs if they came from the police were photographs resulting from a record which this accused man had." It is true that in the present case there was no warning either as to the possible unreliability of Mrs. Kavanagh or as to the impression possibly created by police photographs, but in the opinion of this court the absence of any such warning affords no ground for setting aside the conviction.

Accordingly, this appeal fails.

Appeal dismissed.

Solicitors: **Jeans & Bottomley, for the Crown.**

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE SALMON AND
MR. JUSTICE ELWES

ELSIE HEAD
IVY WARRENER

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Summing-Up—Burden of Proof—"Reasonably Sure."

It is a misdirection to tell a jury that they must be reasonably sure of the defendant's guilt before they can convict.

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Convictions quashed, where a jury had been so directed on a charge of receiving and where the impression had been conveyed that, if they were not satisfied with the defendants' explanation, they should convict.

Appeals against conviction.

The appellants were convicted at Brighton Quarter Sessions on January 9, 1961, of receiving and were sentenced by the Recorder (C. J. A. Doughty, Esq., Q.C.), Head to eighteen months' imprisonment and Warrener to twelve months' imprisonment.

It is unneccessary to set out the facts beyond those appearing in the summing-up, as the case is reported solely on the question of misdirection on burden of proof.

H. T. Buckee for the appellants. The Recorder misdirected the jury by telling them that they must be " reasonably sure " of the appellants' guilt before they could convict. He further misdirected them by telling them that, if they were not satisfied with the defendants' explanation they should convict, instead of telling them if the explanation raised a reasonable doubt, the appellants were entitled to be acquitted. Further, the Recorder did not assist the jury by any review of the evidence.

M. J. P. McNair for the Crown. This was a short and simple case and any detailed review of the evidence was unnecessary. It is true that there are passages in the summing-up where the Recorder's direction with regard to burden of proof and with regard to their acceptance or non-acceptance of the appellants' explanation appears inadequate, but they were corrected in subsequent passages and, regarded as a whole, the summing-up may be held to be sufficient. The Crown do not submit that this is a case where the proviso to section 4 (1) of the Criminal Appeal Act, 1907, could be applied.

ASHWORTH J. These two appellants, Elsie Head and Ivy Warrener, were jointly indicted at Brighton Quarter Sessions before the learned Recorder with the larceny of a radio set or, in the alternative, with having received it knowing it to have

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Ivy
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been stolen. They were convicted of receiving and sentenced, as to Head to eighteen months' imprisonment and as to Warrener to twelve months' imprisonment, and they now appeal on a point of law alleging misdirection by the learned Recorder on the question of burden of proof on the meaning of "reasonable doubt." There is a further ground of appeal, namely, that the inferences a jury may draw in a case of receiving recently stolen goods were not properly explained to the jury.

The facts of the case are relatively simple. A visitor to Brighton by car left her transistor radio set in the car one evening, and when she returned next morning it had gone. On that next day it appears to be common ground that these two appellants jointly sold this transistor set to a general dealer for £4, they having obtained it from Roy or Ron the previous evening for £3. Ron did not give evidence at the trial. His surname was unknown, and it was suggested by the prosecution that he was in fact non-existent. It is fair to the appellants to say that the general dealer who bought it for £4 in turn sold it on for £5. The original owner said it was worth £18, so the matter of price is to a large extent displaced by the general dealer selling it on for £5.

Both the appellants gave evidence denying that they at any time knew that this set was stolen. The learned Recorder summed up, and in the course of his summing up, possibly because the trial had not taken very long, he did not think it necessary to go through the facts in any detail but, although that formed some part of the complaints made on behalf of the appellants before this court, the real ground of the appeal is to be found in the Recorder's direction as regards the burden of proof and his direction in regard to recent possession. At the very start of his summing-up the learned Recorder said this: "Now, before I deal with this case in particular I want to give you a few general observations about the criminal law of this country. In every case, this and every other case, it is always the duty of the prosecution to prove their case so that

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you are reasonably sure of the accused's guilt before you convict him or her, as Mr. Buckee told you. I put it to you clearer, that you must be so reasonably sure—that means you must not be absolutely positive so that there can be no doubt. You must apply your common sense to this matter." It is fair to Mr. Buckee to point out that that reproduction of his submissions to the jury is not accurate.

So far as the direction goes, this court is constrained to say that it is a misdirection on what is a fundamental matter in any criminal trial, namely, the burden of proof. It is not right to tell a jury that they must be reasonably sure. What precisely that means it is not for this court to say, but it imports a standard of certainty below that which is conveyed by the now established direction that they must be satisfied so that they feel sure. The matter is unfortunately made rather more difficult for the upholding of this summing-up by the sentence that followed: "I put it to you clearer, that you must be so reasonably sure—that means you must not be absolutely positive so that there can be no doubt. You must apply your common sense to this matter." It seems to have left a wide area for the jury below the standard of being absolutely positive in which they could find themselves reasonably sure of guilt and therefore convict.

If the matter had stopped there, that would, in the view of this court plainly be a misdirection sufficient to justify this court in allowing the appeal; but it is fair to the learned Recorder to say that at the end of his summing-up he did say this: "If you have any reasonable doubt about it, if you believe their story, if you think they did not know it was stolen, then, of course, you will find them not guilty." That did something undoubtedly to repair the misdirection given earlier on but, in the view of this court, as has been said over and over again, it is of crucial importance that the direction as to the burden of proof and as to the standard of proof should be given in clear terms, and if the tribunal directing the jury adopts a different standard, the accused before that tribunal will not have a jury directed in accordance with the law.

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Further than that, the case involved what is called the doctrine of recent possession. The learned Recorder at page 6 of his summing-up, in a paragraph which I need not read in full, certainly seems to have conveyed to any reasonable jury the impression that, if the jury were not satisfied with the explanation given by the accused persons, they should convict them. That is not the law. The law is quite plain, that if the explanation given by the accused satisfies the jury of its truth or leaves them in a position of doubt or uncertainty, then the Crown has not proved its case and the accused persons must be acquitted. It is true that in the middle of that paragraph there appears a sentence sandwiched between other sentences which does tend to open the door to reasonable doubt, but, taking the paragraph as a whole, the impression created on the minds of the jury, in the view of this court, must indeed have been that if they were not satisfied of the truth of the defendants' explanation they should convict, and that is bad law.

For these reasons, the summing-up is, in the view of this court, open to criticism on the ground of misdirection. The question whether in the circumstances of this case the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied has been a matter that has given the court some concern. There was undoubtedly cogent evidence against these two appellants. It is not surprising in a sense on the facts that the jury were only out for ten minutes before convicting them, but the position remains that there were these defects in the summing-up, and this court is not prepared to say that if they had been properly directed the jury must or probably would have convicted. That is enough to say about the facts, and it is fair to Mr. McNair for the prosecution to say that he did not invite this court in the circumstances to apply the proviso. Accordingly, these appeals must each be allowed and the convictions set aside.

Convictions quashed.

Solicitor: The Town Clerk, Brighton, for the Crown.

[IN THE HOUSE OF LORDS]

BEFORE

LORD DENNING, LORD GODDARD, LORD MORTON OF HENRYTON, LORD MORRIS OF BORTH-Y-GEST AND LORD GUEST

1961
April 26, 27;
May 1, 2, 3;
June 23

SYKES *v.* DIRECTOR OF PUBLIC PROSECUTIONS

Misprision of Felony—Existing Offence—Essential Ingredients—Active Concealment not Necessary—Benefit to Person Concealing not Necessary—Non-Disclosure Due to Claim of Right Made in Good Faith—Failure to Disclose Contemplated Felony.

Misprision of felony is an existing offence and its only ingredients are (i) knowledge that a felony has been committed; and (ii) concealment of such knowledge. Active concealment need not be proved. A person is bound by law to disclose to proper authority all material facts relative to a felony of the commission of which he has definite knowledge, such as the name of the felon, if he knows it, the place where the felony was committed, etc. If he fails to perform this duty when there is a reasonable opportunity available to him to do so, he is guilty of misprision of felony. The duty can be performed by reporting to the police, a magistrate or anyone else in lawful authority.

CRIMMINS (1959) Austr.L.R. 674 approved.

Misprision of felony is a misdemeanour, punishable by fine and imprisonment. The only limitation with regard to sentence is that it must not be inordinately heavy.

It is unnecessary to prove that the person charged converted his knowledge of the felony into a source of emolument to himself.

Dictum of Lord Westbury to that effect in WILLIAMS *v.* BAYLEY (1866) L.R. 1 H.L. 200, at p. 220 not followed and disapproved.

Non-disclosure of felony due to a claim of right made in good faith that it is not in the public interest that the felony should be disclosed will afford a defence to this charge in the case of a communication made by a client to his lawyer, a patient to his doctor, or a parishioner to his clergyman. Other relationships, such as that of master and servant or master and pupil, may give rise to a defence based on a

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similar claim of right, but close family or personal ties will not suffice in this respect where the offence is of such a serious character that it ought to be reported.

Per Lord Goddard: Where it is thought possible and proper to charge an offender as an accessory after the fact, it is preferable to do so rather than to have recourse to a charge of misprision of felony.

Quaere, whether concealment of a contemplated felony amounts to misprision of felony.

Appeal by the prisoner from an order of the Court of Criminal Appeal dismissing his appeal against conviction.

The appellant was convicted at Manchester Crown Court on May 26, 1960, of misprision of felony, in that, knowing that other persons had received firearms stolen from a United States Air Force station in Norfolk, he had unlawfully concealed the commission of the offence and was sentenced by the Recorder (Sir Basil Nield, Q.C., now Mr. Justice Nield) to five years' imprisonment.

The appellant applied for leave to appeal to the Court of Criminal Appeal against conviction and sentence. On January 23, 1961, the Court of Criminal Appeal gave leave to appeal against sentence, but refused leave to appeal against conviction. On February 13, 1961, the court (The Lord Chief Justice, Mr. Justice Winn and Mr. Justice Widgery) heard the appeal.

J. Hugill, for the appellant.
W. D. T. Hodgson, for the Crown.

The judgment of the court was delivered by:

THE LORD CHIEF JUSTICE: This is an appeal by the appellant against a sentence of five years' imprisonment imposed upon him by the Recorder at the Crown Court, Manchester, for misprision of felony. I should say that there was an appeal against his conviction partly on grounds of law, for example, that the offence of misprision of felony no longer existed and, secondly, that at any rate some active concealment was necessary to constitute the offence, and he applied for leave to appeal against his conviction on other grounds of mixed law and fact.

His application and appeal in regard to conviction have been respectively refused and dismissed, but the court on that occasion gave leave to appeal against sentence, amongst other things desiring argument on the question whether there was any express limitation by statute or otherwise on the length of the sentence that could be imposed.

It is unnecessary to refer to the full facts of the case. Suffice it to say that a number of people were involved in stealing firearms from a United States Air Force station in Norfolk, bringing them to Manchester and arranging for their sale, the suggestion being that they were going to the I.R.A. This appellant played some part as a contact man. He was charged before the justices with being an accessory after the fact, it being sought to prove that he had taken part in the resale of the goods. At the Crown Court, however, that was not persisted in and he was charged with misprision of felony in that, knowing that others had received these firearms, he failed to give any information about it.

Mr. Hugill, who is in the embarrassing position of having as his main argument that there is no such offence, has nevertheless sought to persuade us that if there is, the sentence is limited in point of time. I find it unnecessary to go through the old authorities to which he has referred us, from Staundford's *Pleas of the Crown* in 1557 down to Chitty's *Criminal Law* in 1826. It is sufficient, I think, to read a passage from Blackstone's *Commentaries*, Volume IV, p. 132 (1770 ed.), where the law is stated thus: "Misprision of felony is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessory. And the punishment for this, in a public officer, by the Statute of Westminster 1, 3 Edw. 1, c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the King's pleasure." Accordingly, Mr. Hugill contends that the maximum imprisonment is one year. The court is of the opinion, however, that on the assumption that the offence of misprision of felony exists, it is a common law misdemeanour. As such there is in law no limit to the number of years' imprisonment that can be given, save only of course this, that in no case must an inordinate sentence be passed. That has been decided in this court in 1950 in MORRIS [1951] 1 K.B. 394; 34 Cr.App.R. 210, and in HIGGINS [1952] 1 K.B. 7; 35 Cr.App.R. 130 the next year.

In judging what the limit of the sentence should be, in other words, when the sentence would become an inordinate sentence, there are of course a number of criteria. In the case of conspiracy, which is a common law misdemeanour, it has been held that the limit is what could be given for the substantive offence. So here, it seems to this court, that a limit is to be found by at any rate two considerations, first, if, as might have happened here if the evidence had been a little stronger, he had been charged with being an accessory after the fact, the limit would have been two years' imprisonment; further, by the Statute of Westminster [(1275) 3 Edw. 1, c. 9, repealed and replaced by section 29 (1) of the Sheriffs Act, 1887] in the case of a sheriff, where one would think the offence would be more serious, the maximum sentence laid down by the statute was one year and a day. Of course, times have changed since the passing of that statute, and there may be cases, of which it is said this is one, where the nature of the misprision is very serious; but at any rate it seems to the court that it would be impossible to give more than two years. It is, however, unnecessary to say in this case whether more than one year was possible, since, on the facts of this case, it seems to the court that this appellant, who has been in custody since March 29, 1960, has now served an appropriate sentence. Accordingly, the court proposes to set aside the sentence of five years and to substitute such a period of imprisonment as will allow him to be discharged tomorrow.

Counsel for the appellant asked for leave to appeal to the House of Lords against the dismissal of the appeal against conviction, and the Lord Chief Justice, in giving leave, said that the appeal would be confined to such matters as counsel was entitled to argue before the court (i) whether there was such an offence as misprision of felony; and (ii) whether active concealment was an essential ingredient of the offence.

Edward Clarke, Q.C. (*J. Hugill* with him) for the appellant. The offence of misprision of felony is unknown to English law. The existence of the supposed offence is based on a passage in Staundford's *Pleas of the Crown* in 1557: "Misprision: this is properly when anyone learns or knows that another has committed treason or felony and he does not choose to denounce him to the King or to his Council, or to any magistrate, but conceals his offence; this is a misprision." Staundford appears to have made a clerical error in this passage by reading "or" for "and" in the original. The passage should read "treason *and* felony" and subsequent textbooks, which have adopted this passage, have been under a similar misapprehension. Alternatively, if the offence ever existed, it has by this time fallen into desuetude. Parke B. in addressing the grand jury at Lewes Assizes in 1852 appears to have regarded it as still existent, but there are no precedents and no recorded cases in which any person has been indicted for that offence since the time when Staundford wrote in 1557 till 1938. Since that date there have been several prosecutions, but it is submitted that they are based on a misconception and in ABERG [1948] 2 K.B. 173; 32 Cr.App.R. 144, Lord Goddard C.J. appears to have treated the existence of the offence at the present time as very doubtful and its ingredients wholly uncertain. Prior to that, in 1866 Lord Westbury in WILLIAMS *v.* BAYLEY (1866) L.R. 1 H.L. 200, at p. 220 treated the offence as having "now somewhat passed into desuetude."

The Solicitor-General (*Sir Jocelyn Simon*, Q.C., *W. D. T. Hodgson*, Q.C. with him) for the Crown. There are no grounds for supposing that Staundford made any error in his *Pleas of the Crown.* He derived the principles which he states from the old "hue and cry" cases, especially a case in 1315 referred to in

Fitzherbert's *Pleas of the Crown* (1583), p. 395. Staundford's view on misprision of felony is not only adopted by sixteenth and early seventeenth century writers, but is accepted in its entirety by Coke in his *Third Institute* (1809 ed.), c. 65, p. 139, by Hale in his *Pleas of the Crown* (1800 ed.), p. 374, by Foster, who quoted it in MCDANIEL (1755) 19 St.Tr. 746, at p. 805 and Blackstone, *Commentaries*, Vol. IV, p. 121 (1770 ed.). In 1813 Thompson B., in his charge to the grand jury at York, invited them to find a true bill for misprision of felony. In 1826 Chitty in his *Criminal Law* gave a precedent of an indictment for this offence, and in 1852 Parke B. in his charge to the grand jury certainly treated the offence as still existing and in 1877 Stephen described the offence in his *Digest of the Criminal Law*. In recent years several judges have accepted pleas of Guilty to this offence and have passed sentence accordingly. As recently as 1959, in CRIMMINS (1959) Austr. L.R. 674, the Supreme Court of Victoria emphatically affirmed the existence of the offence and dealt with its ingredients.

There are no grounds for saying that active concealment is a necessary ingredient, or for introducing the limitation suggested by Lord Westbury in WILLIAMS *v.* BAYLEY (*supra*) that the concealment must be for the benefit of the person concealing. This suggested limitation appears to have arisen from a confusion between this offence and the offence of compounding a felony. The only point which does still appear to be uncertain is whether concealment of knowledge of a contemplated offence is indictable.

Edward Clarke, Q.C., replied.

The above arguments are somewhat briefly reported, as all the relevant authorities, textbooks, etc., referred to appear in the opinions of their Lordships.

The House took time for consideration.

June 23. The following opinions were read:

LORD DENNING: My Lords, this case raises the question whether there is today such an offence as misprision of felony.

Mr. Edward Clarke says that there has never been such an offence known to our law; or if there has, he says, it has ceased to be an offence by becoming obsolete. The Solicitor-General says that there always has been such an offence and the present case is a good example of its continuing usefulness.

The facts giving rise to the question were as follows: About March 18, 1960, thieves got into the weapon armoury at a United States Air Force Station in Norfolk. They stole 100 pistols, four submachine-guns and about 1,960 rounds of ammunition. They hired a taxi and took the stolen goods to Manchester. They took them into a house of a man named Kenny. A day or two later a man named Whittle brought a van to Kenny's house and took the "stuff" to the house of a man named Black. On March 23, 1960, Sykes comes into the story. We do not know how he came to know about the guns and ammunition, but we know that he went up to an Irishman named Kerwin who was a waiter in a Manchester club and asked him: "Have you any contacts with the I.R.A.?" Kerwin said: "I don't want to talk about it in the club." They talked about it later: and they went to a hotel where they met two men. One of them was Kenny (the man who first received the guns in Manchester) and the other was a man named Tucker (who has not appeared in the story before). Kenny said they had 100 revolvers, some submachine-guns and ammunition for sale. Kerwin led them to think that he had contacts with the I.R.A. and would have to go to London to see them. But instead of going to London, he went to the police and acted under their instructions. On March 27, 1960, Kerwin (prompted thereto by the police) told Sykes that he had arranged to dispose of the guns, but he needed a sample to convince the organisation that the guns were there. Kerwin that night asked Sykes what he expected to gain financially and he said: "Half of what Tucker gets for his share." On March 28, 1960, Kenny took a sample of one of the pistols and gave it to Kerwin (who gave it to the police). Later the police disguised themselves as would-be purchasers of the guns. They were taken to Black's house and shown the goods. Whereupon the police officers disclosed their identity, and arrested Kenny, Whittle and Black. They took possession of the stolen property. Afterwards they arrested Tucker and Sykes. In the early morning of March 29, 1960, at the police station, the superintendent said to Sykes: "I have reason to believe that you were the man who first got into touch with an Irishman and asked him to contact the I.R.A. so that they could buy the guns and that you have been actively helping Kenny and Tucker in arranging for the sale of these guns during the past week." Sykes said: "Look, Inspector, that can't be possible. I don't know this man Kenny and I haven't seen Tucker for four months."

All five men were taken before the magistrates. Kenny, Tucker, Whittle and Black were charged with receiving the goods, knowing them to have been stolen. Sykes was charged as being accessory after the fact. After the evidence was taken, counsel for Sykes urged strongly that he ought not to be committed for trial on the charge of being accessory: there was no evidence that he had taken any active steps to conceal the felony or had done any act for *the purpose* of assisting the others to escape conviction. He relied on JONES [1949] 1 K.B. 194; 33 Cr.App.R. 33. But the magistrates committed all five men for trial.

When counsel was instructed to draft the indictment, he was so impressed by the argument which had been urged before the magistrates that he did not put in a count charging Sykes with being an accessory after the fact, but charged him with misprision of felony. The indictment against the five men was as follows: First count: Kenny, Tucker and Sykes were charged with receiving stolen goods, knowing them to have been stolen. Second count: Tucker and Sykes were charged with misprision of felony. Third count: Black and Whittle were charged with receiving. Fourth count: Kenny, Tucker and Sykes were charged with attempted sale of firearms contrary to the Firearms Act, 1937.

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On May 9, 1960, when the case was called on, counsel for Sykes moved to quash counts 1 and 2 against Sykes on the ground that there was no evidence to warrant them. The judge (Sir Basil Nield) upheld this contention so far as regards count 1 for receiving—there was clearly no evidence of his having possession of the goods—but disallowed it on count 2. So the charge of misprision of felony remained.

On arraignment Black pleaded guilty to receiving. The rest pleaded not guilty and were put in charge of the jury. After the evidence for the prosecution had been called, Kenny, Tucker and Whittle withdrew their pleas of not guilty and pleaded guilty to certain of the charges against them, including, be it noted, a plea of guilty by Tucker to misprision of felony. So at that point all except Sykes had pleaded guilty, and the case went on against Sykes alone. He gave evidence and the judge summed up. The jury found him guilty of misprision of felony, but not guilty of attempted sale of firearms.

On May 26, 1960, the judge sentenced Kenny to seven years for receiving (and two years concurrent for attempted sale of firearms), Tucker to five years for misprision of felony (and two years concurrent for attempted sale of firearms), Black and Whittle each to fifteen months for receiving and Sykes to five years for misprision of felony. Kenny and Tucker applied for leave to appeal against their sentences, but their applications were refused. Sykes applied for leave to appeal against conviction and sentence. On January 23, 1961, the Court of Criminal Appeal refused him leave to appeal against conviction, but granted leave to appeal against sentence. On February 13, 1961, the Court of Criminal Appeal set aside the sentence on Sykes of five years and substituted such a period of imprisonment as would allow him to be discharged on the next day, February 14, 1961.

It transpired, however, that Sykes did not need leave to appeal against conviction because he had a right of appeal on a point of law. So the court treated his application as if it was a final appeal against conviction which had been dismissed: and they gave him leave to appeal to this House limited to the following points: (1) Whether there is such an offence as misprision of felony. (2) Whether active concealment is an essential ingredient of the offence. The question whether there is such an offence as misprision of felony is of great importance and we were privileged to have the results of much research placed before us by counsel on both sides.

Most lawyers know, roughly speaking, what "misprision of felony" means. It means that a man knows that a felony has been committed and neglects to disclose it. But many laymen are perplexed by the word "misprision." What does it mean? Whence its derivation? Lord Coke, *Third Institute*, p. 36, attempted to fit it in with present notions when he said that "Misprision cometh of the French word *méspris* which properly signifieth neglect or contempt": but the authors of the *Oxford English Dictionary*, who included Sir Frederick Pollock, in a very learned article say that the word "misprision" is derived from the old French word "*mésprendre*" which means to act wrongly: and in early times it meant simply a wrong action or omission. This is borne out by the old law books where it is used almost as synonymous with misdemeanour, that is to say, something less than felony which did not carry the death penalty. One of the earliest records of its use is in the *Year Book* in 1484 (2 Richard III, case 22, p. 9 *et seq.*) where a man called Mundy had falsified a writ. It was a felony and, if charged as such, would carry the death penalty: but for mercy's sake, and maybe for convenience also, the judges said he could be indicted for a misprision. "It was allowed it was felony and so included misprision, etc." As a result of this case it was held that every treason or felony included a misprision. The King used to take advantage of this rule in cases of treason, so that, if the man did not deserve the death penalty, he was indicted only with "misprision of treason." Now concealment of treason was itself treason. If anyone knew that another was guilty or in any way incriminated in treason, he was bound at once to go to the

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King or to anyone in his immediate circle and tell him all that happened, see Bracton, Book III, fols. 118, 119. If he did not do so, he could be indicted either for treason which carried the death penalty, or misprision of treason which did not. But this alternative was taken away in 1555. By the statute of 1555 (1 Ph. & M. c. 10), s. 8 it was enacted that " concealment or keeping secret of any high treason be deemed and taken only misprision of treason." From this time forward the phrase " misprision of treason " was taken to denote only the concealment or keeping secret of treason. And by a natural sequence " misprision of felony " denoted only the concealment or keeping secret of felony.

So much for the meaning of the phrase. But now comes the question: Has it ever been an offence known to the law? My Lords, it has been an offence for the last 700 years or more, not always under the name " misprision of felony," but still an offence. Ever since the days of hue and cry, it has been the duty of a man, who knows that a felony has been committed, to report it to the proper authority so that steps can be taken to apprehend the felon and bring him to justice. In the thirteenth century it was his duty " to raise hue and cry," that is to say, he had to report it to the sheriff of the county or his officer or to the constable of the town: whereupon it was the duty of that officer to levy hue and cry, that is, to shout aloud calling on all able-bodied men over the age of 15 to pursue the offender and arrest him: and it was their duty to join in the pursuit. The duty on the officer to levy hue and cry and on the citizens to join in pursuit was reinforced by various statutes and particularly by the Statute of Westminster The First, 1275 (3 Edw. 1, st. 1, c. 9). Under that statute if the officer failed to levy hue and cry when he should have done so, he was liable to imprisonment for a year and to a fine. If a citizen failed to join in pursuit, he was liable to a fine. This statute was re-enacted as recently as 1887 when in section 8 of the Sheriffs Act, 1887, it was laid down that " Every person in a county shall be ready and apparelled at the command of the sheriff and at the cry of the country to arrest a felon . . ."

Although these statutes dealt with the duty of the officers and of citizens to join in pursuit, there was no statute dealing with the duty of the man, who knew of the felony, to report it. This duty rested solely on the common law. There are several cases in the Rolls of the Justices in Eyre where a man was present where a felony was committed, or in the house at the time, or found the dead body of a man who was slain. If he did nothing—did not " raise the hue and cry or do anything "—he was guilty of an offence and liable to be fined. The case which is usually cited in this regard is a case in 1315 which was noted by Fitzherbert in his *Abridgment*, tit. *Pleas of the Crown*, para. 395: but it can be found much more fully reported now in the Selden Society, Vol. 24, p. 152, where Ormesby J. said: " It is the law of the land that such as be present when such a felony as this is committed shall raise hue and cry, and give their aid towards arresting the felons, wherefore you will make fine with the King." The other case on the point is also noted by Fitzherbert in his *Abridgment*, tit. *Conspiracy*, para. 5. It was a case in the year 1457 where a man, who had been present at a killing, reported it to a guardian of the peace. On this account he was charged with conspiracy. The judges rejected the charge: and Prisot, the Chief Justice of the Common Pleas, said: " He was bound by the law to do what he did." Sir William Staundford summarised these cases in this way: " If anyone happens to be present when another is killed, or when a felony is committed, and did not come there in the company of the felons, nor was part of their confederacy, but nevertheless did not intervene or disturb the felons or raise hue and cry, he is not on that account to be held a principal or accessory, for it is not a felony in him but only an offence for which he can be fined like trespass," see Staundford, *Pleas of the Crown*, c. 44, p. 40E. In those early cases the accused man was *present* at the killing and so knew of it. But any other proof or knowledge would

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suffice. In 1550 there was a case where the man was not present but knew of the felony, and was held to be under duty to report it. This was the case: I. S. was robbed of his goods. After the robbery, he pursued the felon and retook his goods. But he let the felon go. All the judges at Serjeant's Inn agreed that he was not to be held to be an accessory but he was guilty of "un concealment," see Moore (K.B.), p. 8. It was said to be "le duty de chescun home sur son allegiance de discoverer felonies."

This offence—concealing or failing to report a felony—does not seem to have acquired a name for itself until 1557 when Staundford gave it one. At the time he wrote, there had recently been enacted the statute of 1555 dealing with misprision of treason, which was the "concealing or keeping secret of any high treason." Staundford seems to have seen here a parallel with the common law offence of concealment of felony. So he, by analogy with the statute, used the words "misprision of felony" to denote the concealment or keeping secret of felony. He gave a separate chapter to misprision and started off with these words: "Misprision: est properment quant ascun sciet ou conust, que un auter ad fait treason ou felony, et il ne voille luy discoverer al roy, ou son counsel, ou a ascun magistrat, eins conceala son offence, ceo est misprision." which may be translated as follows: "Misprision: this is properly when any one learns or knows that another has committed treason or felony, and he does not choose to denounce him to the King or to his Council, or to any magistrate, but conceals his offence; this is a misprision."

My Lords, it was suggested that Staundford in this passage made a clerical mistake. "Ou" should be "et": or, in the translation "or" should be "and." I cannot subscribe to this for a moment. There is internal evidence from the book itself which shows it was no mistake. But apart from this, it was, as I have said, always an offence for a man to conceal or keep secret a felony of which he knew. Actual *presence* at the felony or actual *finding* of the body was proof positive of knowledge. But other proof of knowledge would suffice, as in the case of the man who retook stolen goods from the thief. All that Staundford did was to state the principle disclosed by the cases.

Let no one mistake the high standing of Sir William Staundford. He was a judge of the Common Pleas from Michaelmas, 1554, till his death on August 28, 1558. Foss tells us that he was a great and learned lawyer and he distinguished himself as the author of a highly esteemed *Treatise on the Pleas of the Crown*, which is of great authority. The first edition of it appeared in 1557 during his lifetime and it has been repeatedly followed by subsequent writers. They have often taken his exact words and acknowledged him as the source of what they say. Upon this very subject of misprision of felony you will find him quoted verbatim in 1579 in Rastell's *Termes de la Ley* (1721 ed.), p. 443; in 1583 in Crompton's edition of Fitzherbert's *Office of Justice of the Peace* (Fitzherbert himself had died in 1538, so his own edition did not mention it); in 1607 in Cowell's *The Interpreter*; and in 1609 in Pulton's *De Pace Regis et Regni.* It was quite apparent to the lawyers of that time that Staundford derived his principle from the " hue and cry " cases: for both Crompton in his Fitzherbert (p. 44), Lambard in his *Eirenarcha* (1614), p. 289 and Dalton in his *Country Justice* (1619), p. 284 refer to the " hue and cry " cases and say that a man who is present at a felony and does not raise hue and cry or do anything is guilty of misprision of felony: and they cite the case in 1315 from Fitzherbert, *Pleas of the Crown*, para. 395.

My Lords, if Staundford stood alone, it would suffice. But in 1628 Lord Coke in his *Third Institute* gave the great imprint of his authority to it. He had evidently studied Staundford's book with great care—indeed he pays special tribute to him (at p. 138)—and dealing with misprisions, he says (1809 ed., Ch. 65, at p. 139): " Now are we to speak of concealment or not discovery of felony. As in the case of high treason, whether the treason be by the common law, or statute, the concealment of it is misprision of treason. So in case of felony, whether the felony be by the common law, or by statute, the concealment of it is misprision of felony. . . . And as the concealment of high treason is higher by many degrees than the concealment of felony, so the punishment for the concealment of the greater is heavier than of the lesser: and yet the concealment of felonies in sheriffs, or bailiffs of liberties is more severely punished than in others, *viz.*, by imprisonment for one year, and ransom at the will of the King. [This is clearly a reference to the Statute of Westminster, 1275, c. 9, and shows that Coke too had in mind the 'hue and cry' cases.] From which punishment if any will save himself, he must follow the advice of Bracton, to discover it to the King, or to some judge or magistrate, that for administration of justice supplieth his place, with all speed that he can. . . . And this is intended of a concealment, or not discovery [that is, non-disclosure] of his mere knowledge: for in case of high treason, he that knoweth it, before it be done, and assenteth to it, is *particeps criminis*, and guilty of treason; and in the case of felony, he that receiveth the thief, and assenteth to it, is accessory."

But great as is the authority of Lord Coke, greater still is the authority of the great Chief Justice Sir Matthew Hale on such a subject as this. Writing about the year 1670, he said in his *Pleas of the Crown* ((1800 ed.), Vol. I, p. 374): "By what has been said touching misprision of treason, we may easily collect what is the crime of misprision of felony, namely that it is the concealing of a felony which a man knows but never consented to, for if he consented, he is either principal or accessory in the felony, and consequently guilty of misprision of felony and more." Now what Sir Matthew Hale there said has ever since been regarded as a correct statement of the law of England. In 1755 it was so treated by Foster J. (himself no mean authority), who quoted it in MCDANIEL (1755) 19 St.Tr. 745, at p. 805: and a few years later Sir William Blackstone took it verbatim into the fourth book of his *Commentaries* (1st ed.), p. 121, borrowing the rest from Lord Coke:

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" Misprision of *felony* is also the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal or accessory. And the punishment for this, in a public officer, by the Statute of Westminster 1, 3 Edw. I. c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and in both, fine and ransom at the King's pleasure. . . ."

Every author of any note from that day to this has followed these great names and has said there is an offence of misprision of felony and described it in much the same terms. What need we of any further authority? If Staundford, Coke, Hale and Blackstone all say there is such an offence as misprision of felony, are we to say the contrary? Mr. Edward Clarke invited your Lordships to do so. He said there are no precedents, no recorded cases where any man has ever been indicted for misprision of felony, not from the time that Staundford wrote in 1557 till the year 1938. He said that Staundford made a mistake and all the authors copied from him like automata and fell into error with him. The mere repetition of the cantilena of lawyers cannot, he said, make law. But I would say in answer that there are precedents. They are all the " hue and cry " cases before Staundford wrote. And since he wrote there are records to carry us down to date.

In 1813 Thompson B., in his charge to the grand jury at York, drew their attention to the offence of misprision and thus invited them to find a true bill for it (31 St.Tr. 959).

In 1826 Joseph Chitty gives a precedent of an indictment for misprision of felony which he says " was settled by a very able Crown lawyer." This must have been an actual case. The precedent, after setting out the offence by P.P. the original offender, proceeds as follows: " . . . did conceal, keep secret, and neglect to discover the said felony so committed by the said P.P. as aforesaid, and the name, person, and usual place of resort of the said P.P. did utterly refrain and forbear to disclose and make known." [Chitty on *Criminal Law*, 2nd ed., Vol. 2, p. 232.]

1852 Parke B., when he went to the Home Circuit, addressed the Grand Jury at Lewes in these words as recorded in *The Times* of March 18, 1852: "In the western division particularly a great many felonies were committed of which the parties who were the sufferers by them gave no information to the authorities or the police. He therefore felt himself called upon to say publicly, that it should be known that this proceeding, which was known to the law by the name of 'misprision of felony' was a very serious offence, and subjected the persons who were convicted of it to imprisonment for a year. The law with regard to this matter had certainly fallen into desuetude, but it was very necessary that it should be known it still existed, and during the last 20 years he had himself been called upon to make use of it in the county of Durham, and he had sentenced two persons to a year's imprisonment for having wilfully withheld information relating to an act of felony that had been committed."

We do not know whether any prosecutions for misprision of felony followed upon the words of Parke B. and we have to pass over close on 100 years before we find records of other prosecutions for misprision of felony. And then we find a series of them. Seven or eight were drawn to the attention of your Lordships. I would only mention the case of Mrs. Casserley tried by Humphreys J. at the Central Criminal Court in May 1938 (*The Times*, May 28, 1938), the case of Thomas Prothero (unreported) tried by Hilbery J. at the Salop Assizes in June 1949, and the case of Chapman, Wood & Hyde (unreported) tried by Devlin J. at the Hampshire Assizes in July 1952. Each of those learned judges accepted pleas of guilty to charges of misprision of felony and passed sentence on them.

In the light of this history it is plain that there is and always has been an offence of misprision of felony and that it is not obsolete. It is true that until recently it has been rarely invoked, but that is no ground for denying its existence. This disposes of the first point on which leave to appeal was granted.

There remains the second point whether active concealment is an essential ingredient of the offence. Now the ingredients of the offence can best be seen by comparing it with offences of like degree which have other ingredients.

First: *Accessory after the fact.* The classic definition of an accessory after the fact is when a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon, see 1 Hale P.C. 618, 4 Black. 37. These are all *active* acts of assistance from which it can be inferred that he assented to the felon going free, in contrast to misprision which consists of concealment only, from which no inference of assent need be drawn. It might be thought that the acts of assistance given by Sykes in the present case would be such as to make him an accessory after the fact. But it has been said that, to make a man an accessory, the assistance must be given to the felon *personally*, in order to prevent or hinder him from being apprehended or tried or suffering punishment, see 2 Hawkins, *Pleas of the Crown* (8th ed.), Chap. 29, s. 26, p. 443 and 4 Stephen's *Commentaries* (21st ed.), Chap. 3, CHAPPLE (1840) 9 C. & P. 355, LEVY [1912] 1 K.B. 158; 7 Cr.App.R. 61: so that if the assistance was not given the felon personally, but only indirectly by persuading witnesses not to give evidence against him (see ROBERTS' CASE (1569) 3 Co.Inst. p. 139); or if the acts of assistance were done, not to hinder the arrest of the felon, but with another motive, such as to avoid arrest himself (see JONES (*supra*)) or to make money for himself without regard to what happened to the felon (as in the present case), he would not be guilty as an accessory after the fact. It was these limitations on the offence of being an accessory that led to Sykes being charged with misprision of felony.

Second: *Compounding a felony.* This is the old offence of theft-bote, now made of general application to all felonies and probably also to misdemeanours. Lord Coke says that " this offence is more than misprision of felony, for that is a concealment of his bare knowledge only: but theft-bote is when the owner not only knows of the felony, but taketh of the thief his goods again, or amends for the same, to favour or maintain him, not to prosecute him, to the intent he may escape," see 3rd Inst. p. 134. The offence of compounding a felony in short is *an agreement* not to prosecute a felon in consideration of the return of the goods or other reward, see Blackstone, IV, 133, BURGESS (1885) 16 Q.B.D. 141: whereas in misprision there need be no benefit. This distinction was overlooked by Lord Westbury in WILLIAMS *v.* BAYLEY (1866) L.R. 1 H.L. 200 at p. 220. He seems to have thought that for "misprision of felony" the man must not only have concealed his knowledge of the felony, but further converted it into a source of emolument to himself. That is essential in compounding a felony, but not in misprision of felony. Lord Westbury's dictum has been frequently cited as, for instance, in ABERG [1948] 2 K.B. 173 at p. 176; 32 Cr.App.R. 144; but it is not correct and should no longer be relied upon.

Third: *Interfering with the course of justice.* It is an offence at common law to interfere with the course of justice, such as persuading witnesses not to give evidence (ROBERTS' case (1569) 3 Co.Inst. 139) or fabricating evidence (VREONES [1891] 1 Q.B. 360): or making a false accusation of crime to the police (MANLEY [1933] 1 K.B. 529; 24 Cr.App.R. 25). But this offence requires something *active* to be done to pervert the course of justice.

Fourth: *Obstructing the police.* It is an offence by statute wilfully to obstruct any constable or peace officer when in the execution of his duty. This offence is not confined to physical obstruction. If a policeman was investigating a crime, and someone wilfully misled him by false information, he might well be guilty of this offence. But it is one thing to obstruct a policeman. It is another thing to refuse to help him. Take the case in Australia where a man, who was shot and wounded in an affray, refused to disclose to the police the name of the person who had shot him. It would seem that he was engaged in gang warfare, for he said that he would " cop it sweet " if he disclosed the name. He said he would attend to the matter himself, that is, take his own revenge. No civilised community can tolerate such behaviour. But his offence is not obstructing the police. It is misprision of felony, see CRIMMINS [1959] V.R. 270.

It comes to this, therefore, that these other offences require something active to be done to conceal the crime: whereas misprision requires nothing active. The failure or refusal to disclose the felony is enough. This disposes of the second point on which leave to appeal was granted.

This review of the authorities shows that the essential ingredients of misprision of felony are—

> 1. *Knowledge.* The accused man must know that a felony has been committed by someone else. His knowledge must be proved in the way in which the prosecution have been accustomed in other crimes when knowledge is an ingredient, such as receiving, accessory after the fact, compounding a felony, and so forth. That is to say, there must be evidence that a reasonable man in his place, with such facts and information before him as the accused had, would have known that a felony had been committed. From such evidence the jury may infer that the accused man himself had knowledge of it. He need not know the difference between felony and misdemeanour—many a lawyer has to look in the books for the purpose—but he must at least know that a serious offence has been committed: or, as the Commissioners of 1840 put it, an offence of an " aggravated complexion ": for after all, that is still, broadly speaking, the difference between a felony and misdemeanour. Felonies are the serious offences. Misdemeanours are the less serious. If he knows that a serious offence has been committed—and a lawyer on turning up

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the book sees it is a felony—that will suffice. This requirement that it must be a serious offence disposes of many of the supposed absurdities, such as boys stealing apples, which many laymen would rank as a misdemeanour and no one would think he was bound to report to the police. It means that misprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realise he ought to report it to the police.

2. *Concealment.* The accused man must have " concealed or kept secret " his knowledge. He need not have done anything active: but it is his duty by law to disclose to proper authority all material facts known to him relative to the offence. It is not sufficient to tell the police that a felony has been committed. He must tell the name of the man who did it, if he knows it; the place, and so forth. All material facts known to him, see CRIMMINS, *supra.* If he fails or refuses to perform this duty when there is a reasonable opportunity available to him to do so, then he is guilty of misprision. He can perform this duty by reporting to the police or a magistrate or anyone else in lawful authority. Failure to do so is a misprision of felony.

Misprision of felony is itself a misdemeanour and is punishable by fine and imprisonment. Whatever limitations may have existed in olden days on the period of imprisonment that might be imposed, the only limitation now is that it must not be an inordinately heavy sentence.

My Lords, it was said that this offence is out of date. I do not think so. The arm of the law would be too short if it was powerless to reach those who are " contact " men for thieves or assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony. I am not dismayed by the suggestion that the offence of misprision is impossibly

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wide: for I think it is subject to just limitations. Non-disclosure may be due to a claim of right made in good faith. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported. In 1315 it was held that it was the duty of a brother to raise hue and cry against his own brother and he was fined for not doing so, see 24 Selden Society, p. 144: and in 1938 a mistress was found guilty of misprision for shielding her lover (MRS. CASSERLEY'S case) (*supra*). The judges have not been called upon further to define the just limitations to misprision, but I do not doubt their ability to do so, if called upon.

My Lords, there was some discussion before us whether a man was bound to disclose a contemplated felony which comes to his knowledge, such as a planned raid on a bank. There is a striking passage in Lambard's *Eirenarcha* (1614), p. 289, which says that failure to do so is misprision of felony. So does Dalton's *Country Justice* (1619), p. 211 and Hawkins' *Pleas of the Crown*, 8th ed., Vol. 2, Chap. 29, s. 23, p. 444. These are weighty authorities and the Commissioners who reported on the Criminal Law in 1843 were clearly in favour of it. They said: "The necessity for making such disclosures extends, perhaps, with greater force, to the knowledge of a meditated crime, the perpetration of which may, by means of such a disclosure, be prevented, than it does to the knowledge of one already committed." This is good sense and may well be good law. I would therefore reserve this point which does not arise in the present case.

I ought to mention one other matter. Mr. Clarke sought to raise a point of misdirection on which leave to appeal was not granted. He said that, once leave to appeal was given, the appellant in this House can open up all grounds available to the court below; he is not limited to the point on which leave was granted. The Solicitor-General denied this. He said that the appellant was limited to the point of general public importance, but the respondent was not. I do not think it necessary to resolve this question today because there is no substance in the point which Mr. Clarke sought to raise. He suggested that the judge had misdirected the jury in drawing their attention to the fact that Kenny had pleaded guilty to receiving. I see no misdirection in the judge telling the jury what they very well knew—Kenny had pleaded guilty in their presence—for the judge had already warned them that the pleas of guilty should not be allowed to prejudice Sykes.

I would dismiss the appeal.

LORD GODDARD: My Lords, the appellant was convicted at Manchester Crown Court of the misdemeanour known as misprision of felony. His appeal to the Court of Criminal Appeal was dismissed and he applied for and obtained a certificate that a point of law of general public importance was involved and was given leave to appeal to this House limited to two points: (1) Whether there is such an offence as misprision of felony, and (2) Whether active concealment is an essential ingredient of the offence. Before this House counsel for the appellant contended that there never was known to the law such an offence, but that, if there ever had been, it had disappeared by obsolescence and should no longer be indictable. On the question whether there ever was such an offence counsel with immense industry had brought to your Lordships' notice a very large number of authorities, consisting of extracts from institutional writers on the criminal law, and cases decided not only in England but in other jurisdictions where the English common law prevails, and the result is, as it appears to me, to show that for centuries there has been *communis opinio* among all the writers and such of the judges who have had to consider the matter that there is such an offence and no trace of it ever having been doubted until the present case.

The first book that was discussed in argument was an edition of Staundford's *Pleas of the Crown* published in 1607 some years after the author's death. He was a judge of the Common Pleas from 1554 to 1558 and seems to have been a fairly prolific writer on the law. He describes misprision as "properly when anyone knows or understands that another has committed treason or felony and will not disclose it to the King or his Council or any magistrate and so conceals the offence," and then he quotes a passage from Bracton which is wide enough to cover misprision both of treason and felony. No one doubts that misprision of treason was and is a crime and it was specially the subject of a statute 1 & 2 Ph. & M. c. 10. Mr. Clarke contended that Staundford was mistaken in treating misprision of felony as distinct from treason as a crime and that this mistake has continued and misled all the subsequent writers on the subject. As I understood the argument, it was that when the writer refers to treason *or* felony the *or* is a misprint or mistake for *and*. If so, it is remarkable that it is repeated three times in the article and has misled, to name only a few, Coke, Hale and Blackstone, all of whom name misprision of felony as a misdemeanour while at the same time they deal with misprision of treason as quite a separate offence. I cannot think that either Staundford or the editor of his work were under any misapprehension on this matter. It is stated to be an offence by Fitzherbert who was a judge of the Common Pleas from 1522 to 1538. He was the author of *The Natura Brevium* and has always been regarded as a writer of the highest authority. It is in his book entitled *L'Office et autorité de justices de Peace* that he deals with this offence. An English edition of this book according to Dr. Round was first published in 1538 and frequently republished with additions by Richard Crompton, a Bencher of the Middle Temple, and it may well be that some part of the article on misprision was added by the editor as he quotes Staundford in support. That there seem to have been at least six editions of this work, the last in 1617, shows the respect in which it was held. The offence was discussed in detail by Dalton in his *Country Justice*, first published, again according to Dr. Round, in 1618 and held in such high repute that it was constantly republished, the last edition being dated 1742. It may indeed be described as the eighteenth century " Stone." Then the offence is described and discussed in detail by Coke in his *Third Institute* and at even greater length by Sir Matthew Hale, who became a judge of the Common Pleas in 1654 and was afterwards Lord Chief Justice of the King's Bench from 1671 to 1676. His works on the Pleas of the Crown have always been regarded as of the highest authority and are still cited at the present day. Blackstone deals with the matter, quite shortly defining the offence as the concealment of a felony which a man knows but never assented to; for if he assented, this makes him either principal or accessory. Before parting with the writers of the eighteenth century, and there are several others, all to the same effect, it is worth noticing the case of McDANIEL (1755) in 19 St. Tr. 745. All the judges had considered at Serjeant's Inn the effect of a special verdict returned by a jury at the Newgate Sessions and Foster J. who afterwards delivered the judgment quoted (at p. 805) as an authority: " What Lord Hale saith, in 1 Hale 374—Misprision of felony is concealing a felony which a man knoweth but never consented to, for if he consented he is either principal or accessory." It appears to me, therefore, to be beyond question that at least by the middle of the eighteenth century it was firmly established that misprision of felony was an offence. But I would add that it is not so clear whether the concealment of knowledge that an offence was contemplated is indictable. This indeed is stated by Lambard, Dalton and Hawkins as included in the offence of misprision, but not by any other authority. One can well understand the opinion that it ought to be. It arises out of the recognition that it is the duty of every citizen to assist in the detection and suppression of crime and that prevention is better than cure. The offence may be said to be in the same category as refusing to aid in arresting a suspect when called on by an officer of the law or refusing to comply with the sheriff's call on the posse comitatus or failing to take part in the hue and cry, but to hold that there was a positive duty to inform the executive that a crime was or might be contemplated might in practice cause many difficulties and as, except for the observations of the three writers to whom I have referred, there is otherwise no authority on the point as at present advised, I hesitate to hold that it is established there is such a duty.

But it is contended that the offence is obsolete or fallen in desuetude. On this subject we have the guidance of Lord Sumner in BOWMAN *v.* SECULAR SOCIETY [1917] A.C. 406 at 454 where he said: " if a maxim expresses a positive rule of law once established though long ago, time cannot abolish it nor disfavour make it obsolete." This in no way detracts from the wisdom of Bacon who in his essay on Judicature observes: " Penal laws if they have been sleepers a long time or if they have grown unfit for present use should by wise judges be confined in execution," which seems to me to mean should be sparingly enforced. But this law has not been sleeping for a long time. So far I have traced it to the end of the eighteenth century. No doubt it was seldom prosecuted in the nineteenth century, but we have been referred to a report of a charge to the Grand Jury at York by Thompson B. in 1813, from which it appears that in his opinion misprision of felony was indictable as a misdemeanour and even more striking is it that Joseph Chitty, whose pre-eminence as a pleader both in civil and criminal matters and as an author on many branches of the law is well known, in his second edition of precedents sets out one for this offence with a note that it was settled by a well-known Crown lawyer. Chitty's works were essentially working books for practitioners and it is most unlikely that he would have included a precedent for this offence if by this time, 1826, it was regarded as obsolete. Then we were supplied with a report of a charge given to the Grand Jury of Sussex in 1852 by Baron Parke, one of the greatest Victorian judges, in which he said it should be known that failure to give information as to felonies to the authorities, known to the law as misprision of felony, was a very serious offence. That law, he said, had certainly fallen into desuetude, but it was very necessary it should be known that it still existed and that during the previous twenty years he had been called on to make use of it. In 1866 Lord Westbury referred to misprision of felony in his speech in WILLIAMS *v.* BAYLEY, L.R. 1 H.L. 200, at p. 220, though he added a dictum with regard to the constituents of the offence that the concealment must be for the benefit of the person concealing the matter. It seems that his Lordship was momentarily confusing misprision with compounding a felony, which was what the case was concerned with, and in my opinion there is no authority for that dictum and it matters not what induces the concealment. This was the view of the Supreme Court of Victoria whose careful and interesting judgment on this subject in the case of CRIMMINS [1959] V.R. 270 was delivered as recently as February 1959. The court emphatically affirmed the existence of the offence at the present day. Finally it is to be observed that Sir FitzJames Stephen in 1877 described the offence in his *Digest of the Criminal Law.* Though in my opinion the offence should be sparingly prosecuted, I am by no means prepared to say that it has no use in our criminal law at the present day; it may well be used when there is technical difficulty in framing a charge of being an accessory after the fact to a felony, and counsel who had acted for the prosecution told us that was the reason for using it in the instant case. Moreover, it is almost a commonplace in these days to find the police appealing for persons whom they think must be able to throw light on some serious crime to come forward and give their assistance. And there have been instances quite recently in wounding cases arising out of gang warfare of refusing to assist the police as to the identity of the attackers, whether from fear of reprisals or from a mistaken sense of loyalty. It is very easy to poke ridicule at the offence and say that it obliges people to inform against a boy stealing an apple. The law is nowadays administered with dignity and common sense. And if it is said it obliges a father to inform against his son, or vice versa, I would answer that in the case of a really heinous crime be it so.

In my opinion, therefore, misprision of felony is today an indictable misdemeanour at common law, and a person is guilty of the crime if, knowing that a felony has been committed, he conceals his knowledge from those responsible for the preservation of the peace, be they constables or justices, within a reasonable time and having a reasonable opportunity for so doing. What is a reasonable time and opportunity is a question of fact for a jury and also whether the knowledge that he has is so definite that it ought to be disclosed. A man is neither bound nor would he be wise to disclose rumours or mere gossip, but if facts are within his knowledge that would materially assist in the detection and arrest of a felon he must disclose them, as it is a duty he owes to the State. The gist of the offence is concealment which may be passive, that is mere non-disclosure, or active in destroying or hiding evidence, though in the latter case it would probably often amount to being an accessory after the fact, and I would add that where it is thought possible and proper to charge a person as an accessory it is preferable to do so rather than have recourse to the offence of misprision. I would also add that it matters not what induces the concealment and that the dictum of Lord Westbury referred to above should be regarded as incorrect.

My Lords, I would dismiss the appeal.

LORD MORTON OF HENRYTON: My Lords, in my opinion (1) there is such an offence as misprision of felony and (2) active concealment is not an essential ingredient of that offence. I gratefully adopt the following passage in the judgment of the Supreme Court of Victoria (Sir Edmund Herring C.J., O'Bryan and Dean JJ.) in CRIMMINS [1959] V.R. 270, at p. 272: "In our opinion the citizen's duty to disclose any treason or felony, of which he has knowledge, remains the same and is still as binding upon him as it was in the early days of the common law. And no doubt cases will arise, from time to time, when the public interest will be best served by the citizen, who fails in this duty, being prosecuted for misprision of felony. There is certainly no justification for the view that such a prosecution is no longer available to the Crown. The question then is: What are the constituent elements in the crime? We think they are really determined by what we have already said. The offence lies in the failure to perform the duty to disclose, and it matters not what induced the citizen not to do his duty."

I refrain from dealing with the earlier authorities on this important matter, as they have been fully discussed in the speeches of my noble and learned friends Lord Denning and Lord Goddard. As to the recent authorities, although I agree with the last sentence in the passage which I have quoted from the judgment in CRIMMINS (*supra*), I have much sympathy with the view recently expressed by Slade J. when summing up to the jury in the case of WILDE at the Leeds autumn assizes on December 14, 1959. That case is shortly reported in the *Criminal Law Review*, 1960, p. 116, and a transcript was provided for your Lordships' use. The learned judge introduced a limitation in putting to the jury the question whether the accused men had failed in their duty to disclose certain thefts by a woman employee. He put the question thus: "Has the prosecution proved beyond reasonable doubt that the nature and extent of her thefts, as known to the accused, was such that a reasonable man would consider it his duty to inform the police of it?" And he added: "I put that in to eliminate the case of the small boy and the windfalls." Earlier, the learned judge had said: "Counsel . . . urged upon me not to regard as a sufficiently serious offence to require reporting to the police if you saw, for example, a fifteen-year-old boy picking up a couple of windfalls in your garden and you know that in fact he had stolen them. In law it is as much a felony as the most serious bank robbery. I have endeavoured, because I prefer to err, if at all, in favour of the accused, to draft a question to embody that limitation."

My Lords, I think the learned judge erred in law in importing that limitation into the offence of misprision of felony; but his words may well be regarded as a valuable indication of the type of case in which a prosecution for that offence is appropriate.

I would dismiss the appeal.

LORD MORRIS OF BORTH-Y-GEST: My Lords, it was contended on behalf of the appellant that no such offence as misprision of felony has existed in English criminal law and that the manifold references to its supposed existence have been based upon mistaken repetitions of error or misapprehension which was contained in Staundford's "*Les Pleas del Corone.*" Alternatively it was contended that, if this common law misdemeanour was ever known to the law, it has now become obsolete so that today no such offence exists. I have had the privilege of reading in advance the speeches which have been delivered by my noble and learned friends Lord Denning and Lord Goddard and I concur with the view that for centuries misprision of felony has been recognised as an offence. I find no convincing justification of the suggestion that Staundford made a misstatement or a mistake. Furthermore, the words of Coke and of Hale and of Blackstone are as clear as their authority is massive. Not only have they declared that there is such an offence, but they have shown that it consists in the concealment of a felony of which a man knows though he has not assented to it.

The authorities do not support the view that some active concealment must be proved. If there is knowledge that a felony has been committed, then the mere failure and omission to report and disclose what is actually known is an offence. The suggestion contained at one point in the speech of Lord Westbury in WILLIAMS *v.* BAYLEY (1866) L.R. 1 H.L. 200, at p. 220 that the concealment must be of advantage or a source of profit is not founded upon authority. The question as to whether any offence is committed if there is a failure to disclose knowledge that some felony is being planned and projected does not now call for decision.

It may well be that long periods passed during which there were no recorded convictions for this offence, but this does not warrant an assumption that in some way or by some process the law became changed. The references in McDANIEL (1755) 19 St.Tr. 745, in the charge of Thompson B. in 1813 (see 31 St.Tr. 959) and in the charge of Parke B. in 1852, demonstrate that judges regarded the offence as existing at those dates and several examples of convictions of the offence within this century have been cited.

Situations and circumstances can be postulated in which it can be urged that it would seem to run counter to the fitness of things to acknowledge that the offence has been committed. On the other hand, situations and circumstances can also be contemplated in which a failure to disclose knowledge would be condemned as being outrageous. The fact that prosecutions have been and doubtless will continue to be infrequent demonstrates that the law is the handmaid of reason.

I would dismiss the appeal.

LORD GUEST: My Lords, the Court of Criminal Appeal granted leave to appeal to the House of Lords limited to the following points: (1) Whether there is such an offence as misprision of felony: (2) Whether active concealment is an essential ingredient of that offence.

Upon the first question I agree with the opinion expressed by my noble and learned friend Lord Goddard that the answer to this question must be " Yes " for the reasons given by him.

Upon the second question I also agree with your Lordships who have preceded me that the answer is " No." Reference has already been made to the numerous institutional writers who have defined this offence and I cannot find in these writers any statement that active steps of concealment are required to constitute the offence. Staundford's " *Les Pleas del Corone* "

(1607) p. 37: "Misprision is properly when anyone knows or understands that another has committed treason or felony, and he will not disclose it to the King or his Council, or any magistrate, and so conceals the offence, this is misprision, which offence Bracton has put amongst the offences of treason, because it seemed to him that concealments sometimes were closer to treason than to a misprision and on that account these are his words:—" He then quotes from Bracton the passage already cited. The writers who follow in describing misprision of felony refer to the failure to disclose the commission of a felony as an offence of omission. If more active steps were required to constitute the offence of misprision of felony, this would equiparate the offence to that of being accessory after the fact, which is an entirely distinct offence. Sir Basil Nield in his summing up to the jury incorporated in his definition of misprision of felony the conception of deliberate concealment which would suggest that the concealment must be wilful. There is, in my opinion, no sufficient justification in the authorities for limiting the offence in this way. The offence consists in a mere omission to disclose a felony.

Sir Basil Nield also directed the jury that the concealment must be for gain or reward to the misprisor. I have no doubt that this direction was derived from an expression of an *obiter dictum* of Lord Westbury in WILLIAMS *v.* BAYLEY (1866) L.R. 1 H.L. 200, at p. 220, where he said: "If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under the words which have now somewhat passed into desuetude, namely, 'misprision of felony.' That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and, further, converted it into a source of emolument to himself." There is, in my opinion, no warrant

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for this limitation and the direction which was, of course, favourable to the accused did not correctly express the law.

I would for these reasons refuse the appeal.

Appeal dismissed.

Solicitors: Church, Adams, Tatham & Co., for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE,
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Road Traffic—Causing Death by Dangerous Driving—Dangerous Driving—Evidence of Drink—How Far Admissible—Discretion of Judge to Exclude—Road Traffic Act, 1960 (8 *&* 9 *Eliz.* 2, *c.* 16), *ss.* 1, 2, 6.

Indictment—Causing Death by Dangerous Driving—Dangerous Driving—Inclusion of Count for Driving under Influence of Drink.

The fact that the driver of a motor-vehicle is adversely affected by drink is a circumstance relevant to the issue of whether he was driving dangerously, and evidence to this effect is of probative value and admissible in law. On a charge of causing death by dangerous driving or of dangerous driving the mere fact that the prisoner had taken drink is not of itself relevant; in order to render evidence of the drink taken by him admissible, such evidence must tend to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the prisoner was in fact adversely affected. Further, there remains in the court an overriding discretion to exclude such evidence, if, in the opinion of the court, its prejudicial effect outweighs its probative value. If such evidence is to be introduced, it should at least appear of substantial weight.

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An indictment under section 1 of the Road Traffic Act, 1960, should not include a charge under section 6 of driving under the influence of drink. A charge under section 2 of dangerous driving may properly be joined in an indictment with a charge under section 6, if the evidence regarding the influence of drink on the driver is such as to justify it.

Appeal against conviction (on certificate).

The appellant was convicted at the Central Criminal Court on March 30, 1961, of causing death by dangerous driving and was sentenced by the Commissioner (Judge Block) to six months' imprisonment and disqualification from holding a driving licence for ten years.

The charge arose out of a collision in Edgware Road, London, between a van driven by the appellant and a motor-car coming towards him. It was alleged against the appellant that when overtaking a trolley-bus at a time when it was unsafe to do so he drove on the wrong side of the road in the face of approaching traffic. Evidence as to the appellant's condition and as to the drink which he had consumed was such as might have justified a charge under section 6 of the Road Traffic Act, 1960, although no such charge was in fact preferred. Objection to such evidence was successfully taken before the committing justices, but notice of additional evidence was duly served upon the appellant's solicitors and no question arose of their having been taken by surprise. At the trial, after hearing argument from both sides, the judge decided that the evidence was admissible in law and that in the exercise of his discretion he ought to admit it.

W. M. F. Hudson, for the appellant. Evidence of drink taken by a person accused only of dangerous driving is irrelevant and accordingly inadmissible in law. Such evidence may explain why the accused person drove dangerously, but is irrelevant to the question whether in fact he did so. That question must be considered objectively, not subjectively in relation to the particular driver: HILL *v.* BAXTER [1958] 1 Q.B. 277; 42 Cr.App.R. 51. If such evidence is to be admissible

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at all, it can only be introduced by the prosecution as rebutting evidence, to rebut a defence that the driver ceased to have control of the vehicle through no fault of his own: Noor Mohamed *v.* R. [1949] A.C. 182; Harris *v.* D.P.P. [1952] A.C. 694; 36 Cr.App.R. 39. Different judges have taken different views of the admissibility of evidence of drink on a charge of dangerous driving. In Threlfall (unreported) Liverpool Crown Court, November 1, 1960, Stable J. refused to allow such evidence to be given unless a second count charging driving under the influence of drink were added to the indictment. In Brookbanks (unreported) Bedford Assizes, December, 1951, Byrne J. ruled that such evidence could be introduced only in exceptional and otherwise inexplicable cases when no charge of driving under the influence had been preferred; and where such evidence has been admitted in cases tried at assizes, it may well have on this basis.

R. D. L. du Cann, for the Crown. The relevance of evidence of this kind must depend on the degree of the influence of alcohol. It is conceded that it would not be right to introduce evidence of the prisoner having consumed alcohol in a case where this had had no real effect on him; but where there is evidence that he had been appreciably affected by the alcohol or that the amount consumed was great, such evidence becomes relevant and admissible. Judges of assize have rightly admitted such evidence in those circumstances. Here there was evidence of the appellant having consumed such a quantity of drink as would have justified a charge under section 6 of the Act of 1960. The evidence was, therefore, clearly admissible, and even if it be conceded that the judge has always an overriding discretion to exclude such evidence if it is likely to have an unduly prejudicial effect, here the judge rightly exercised his discretion in admitting it. There are difficulties about adopting the course suggested by Stable J. in Threlfall (*supra*). It has generally been accepted that an indictment for manslaughter should not include a count for any other offence, though exceptions have been recognised, and it has been thought that the same should apply to an indictment

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for causing death by dangerous driving. On the other hand, counts for dangerous driving simpliciter and driving under the influence of drink have frequently been included in the same indictment. The Crown would welcome a direction from the court on the proper practice with regard to including a count for driving under the influence of drink in an indictment for other offences.

W. M. F. Hudson replied.

At the conclusion of the arguments the court stated that the appeal would be dismissed, and that reasons for their decision would be given at a later date.

Cur. adv. vult.

June 23. The judgment of the court was read by:

ASHWORTH J. The appellant was convicted at the Central Criminal Court on an indictment charging him under section 1 of the Road Traffic Act, 1960, with causing death by dangerous driving. He has appealed to this court in pursuance of a certificate granted by the learned trial judge, the point in issue being whether evidence was rightly admitted to the effect that before the collision which resulted in the death of the deceased the appellant had "drink taken." As this matter has been the subject of conflicting judicial rulings, a court of five judges was constituted for hearing the appeal.

The charge arose out of a collision in Edgware Road, London, between a van driven by the appellant and a motor-car coming towards him. It was alleged against the appellant that when overtaking a trolley-bus at a time when it was unsafe to do so he drove on the wrong side of the road in the face of approaching traffic. Evidence as to the appellant's condition and as to the drink which he had consumed was such as might have justified a charge under section 6 of the Road Traffic Act, 1960, although no such charge was in fact preferred. Objection to such evidence had been successfully taken before the committing justices, but notice of additional evidence had been duly served on the appellant's solicitors, and no question arose of their having been taken by surprise. At the trial, after

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hearing argument from both sides, the learned judge decided that the evidence was admissible in law and that in the exercise of his discretion he ought to admit it.

Before this court, Mr. Hudson, for the appellant, contended in the first place that evidence as to drink taken by a person accused only of dangerous driving is inadmissible in law as being irrelevant. In his submission such evidence may explain why a person drove dangerously, but is irrelevant to the preliminary question whether he did so in fact, which must be considered objectively and not subjectively in relation to the particular driver.

This court does not propose in any way to qualify the principle, which must now be regarded as well established, that in cases of dangerous driving the proper test for the tribunal to apply is what is generally known as the objective test. Juries are frequently invited to consider the matter from the point of view of an imaginary person who could see what happened and thus make up his mind whether in all the circumstances the accused was driving dangerously. In the majority of cases no doubt this approach to the problem is both convenient and correct, but cases may arise in which a bystander, however observant, would not be aware of all the circumstances relevant to the issue whether the accused was driving dangerously. For example, he would be unaware of the condition of the driver in regard to sleepiness or the effect of drink. Dangerous driving may occur without a collision or indeed without any indication from the speed or movement of the vehicle that the driving of it was in the circumstances dangerous: see HILL *v.* BAXTER (1958) 42 Cr.App.R. 51; [1958] 1 Q.B. 277.

In the opinion of this court, if a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously. Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend

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to show that the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected. Secondly, there remains in the court an overriding discretion to exclude such evidence if, in the opinion of the court, its prejudicial effect outweighs its probative value. It is impossible to lay down any general rule as to the way in which this discretion should be exercised, as each case must be considered in the light of its own particular facts, but in the opinion of this court, if such evidence is to be introduced, it should at least appear of substantial weight. In the present case the evidence as to the appellant's condition in regard to drink was clearly of substantial weight and, in the opinion of this court, the learned judge rightly exercised his discretion in admitting it.

It was also contended for the appellant that evidence as to drink taken by a driver could only be adduced by the prosecution by way of rebuttal of a defence suggesting that through no fault of his own the driver was not in control of the vehicle when it was said to have been driven dangerously. In support of this contention reference was made to NOOR MOHAMED *v.* R. [1949] A.C. 182, and HARRIS *v.* DIRECTOR OF PUBLIC PROSECUTIONS (1952) 36 Cr.App.R. 39; [1952] A.C. 694, but the problem considered in those cases was altogether different from that involved in the present case. In those cases the question was whether evidence of similar events which occurred on other occasions was admissible in support of the main charge. In the present case the matters covered by the disputed evidence formed part of the story involved in the main charge itself. In the opinion of this court there is no foundation for the contention that the admissibility of this type of evidence is limited in the way suggested.

In the course of the argument before this court a request was made by counsel for the prosecution that some guidance should be given on the question whether a charge under section 6 of the Act of 1960 should be preferred in addition to a charge of dangerous driving, assuming that there is evidence to justify such additional charge. Without wishing to give any general

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direction, this court is of the following opinion: (a) an indictment containing a charge under section 1 of the Act (causing death by dangerous driving) should not include a charge under section 6. This view is in accordance with the practice under which an indictment charging manslaughter has not included a count alleging driving under the influence of drink. (b) A charge under section 6 may properly be coupled with a charge of dangerous driving under section 2, if the evidence regarding the influence of drink upon the driver is such as to justify it.

As was indicated at the conclusion of the argument, this appeal is dismissed.

Appeal dismissed.

Solicitor: The Solicitor, Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE SLADE, MR. JUSTICE ASHWORTH,
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BRIAN MICHAEL FLYNN

Evidence—Character of Prisoner—Cross-Examination on Previous Convictions—Imputation on Character of Crown Witness—Imputation Rendered Necessary by Nature of Defence—Discretion of Judge—Criminal Evidence Act, 1898 (61 *&* 62 *Vict. c.* 36), *s.* 1 (*f*) *exception* (ii).

Where the very nature of the defence of a prisoner necessarily involves an imputation on the character of a Crown witness, the judge should, as a general rule, exercise his discretion in favour of the prisoner and exclude cross-examination of the prisoner on his bad character or previous convictions, although such evidence is legally admissible.

The appellant was charged with robbery, the allegation of the prosecution being that he had followed the prosecutor from a public lavatory and extracted a sum of money from him by means of threats. The defence (which was put to the prosecutor in cross-examination) was that the money had been

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handed to the prisoner by the prosecutor voluntarily by way of hush money after the prosecutor had made indecent overtures to and committed an indecent assault on the prisoner in the lavatory. By leave of the court, the prisoner was cross-examined on his previous convictions, on the ground that the nature or conduct of his defence involved an imputation on the character of the prosecutor within the meaning of the exception (ii) to section 1 (*f*) of the Criminal Evidence Act, 1898.

Held (i) that, as the defence did involve such an imputation, the cross-examination was admissible in law: (COOK (1959) 43 Cr.App.R. 138; [1959] 2 Q.B. 340 followed); but that the judge, in the exercise of his discretion, should have excluded the cross-examination, and as the judge had wrongly exercised his discretion, the conviction must be quashed.

Appeal against conviction (on certificate).

The appellant was convicted at Folkestone Quarter Sessions on April 8, 1961, of robbery and was sentenced by the Recorder (Tristram Beresford, Esq., Q.C.) to twelve months' imprisonment.

The prosecution alleged that the appellant followed a Major X from a lavatory in Folkestone on to the promenade and there extracted from him the sum of £1 18s. by means of threats. The appellant's case was that the money was handed to him voluntarily by Major X as hush money after Major X had made indecent overtures to and committed an indecent assault on him in the lavatory. At the trial these matters were put to Major X in cross-examination by defending counsel and the appellant gave evidence in support of that defence. By leave of the Recorder, he was cross-examined by counsel for the Crown on his previous convictions. The appeal, which came on for hearing on June 12 before a court composed of Ashworth, Salmon and Elwes JJ., was adjourned for the consideration of a court of five judges.

Michael Parker, for the appellant. The defence was not an imputation on the character of a Crown witness within the meaning of exception (ii) to section 1 (*f*) of the Criminal Evidence Act, 1898, because all that was being done by the

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defence was to negative an essential ingredient which the prosecution had to prove as part of their case, namely, that the money was handed over by the prosecutor as the result of threats by the appellant. There is no reported case where in such circumstances a suggestion of this kind has resulted in the admission of cross-examination of the prisoner with regard to his previous convictions. Such admission would be wholly inconsistent with the analogous case of rape. It has there been held that cross-examination of the prisoner on his previous convictions is not permissible, even though he has raised the defence of consent on the part of the prosecutrix and put to her matters indicating consent; TURNER (1944) 30 Cr.App.R. 9; [1944] 1 K.B. 463, approved by the House of Lords in STIRLAND *v.* D.P.P. (1944) 30 Cr.App.R. 40; [1944] A.C. 315. Even if the stricter view of the interpretation of the statute indicated in HUDSON (1912) 7 Cr.App.R. 256; [1912] 2 K.B. 464 and more recently in JENKINS (1945) 31 Cr.App.R. 1 and COOK (1959) 43 Cr.App.R. 138; [1959] 2 Q.B. 340 be held to be correct, it is clear from the last case that the presiding judge has an overriding discretion not to permit the cross-examination if its prejudicial effect will wholly outweigh its evidential value and in a case such as the present, where the imputation arose from the very essence of the defence, the judge should have exercised his discretion and excluded the evidence of the appellant's previous convictions.

B. R. Clapham, for the Crown. The offence of rape is in a separate category and *sui generis*, because in that case the imputation is only on the morality of prosecutrix and there is no imputation of a criminal character. The peculiar nature of the defence of consent in rape with regard to section 1 (*f*) of the Criminal Evidence Act, 1898, was recognised in STIRLAND *v.* D.P.P. (*supra*) and COOK (*supra*). Here the general rule that the section must receive its natural interpretation applies: (COOK (*supra*)) and the cross-examination was, therefore, clearly admissible in law. Whether the Recorder should have permitted it or not was entirely a matter for his discretion and this court is slow to interfere with the exercise of discretion by

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a trial judge in a matter of this kind. Even if the court should hold that the Recorder exercised his discretion wrongly, it is submitted that the court might properly consider the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, in view of the strength of the evidence for the prosecution.

Michael Parker replied.

SLADE J. This appellant, Brian Michael Flynn, was convicted at Folkestone Borough Quarter Sessions of robbing a Major X of £1 18s. in money and was sentenced by the Recorder to imprisonment for twelve months. He now appeals, by certificate from the learned Recorder, against his conviction.

The only ground of appeal is whether the learned Recorder was right in allowing counsel for the prosecution to cross-examine the appellant about his previous convictions, in the presence of the jury and before they reached their verdict.

The material facts are these: The complainant was a retired Army Major of sixty-six years of age. He gave evidence that at about 4.30 p.m. on Friday, March 3, he was urinating in a public lavatory when someone came in. He did no more than glance at him, but was conscious that this person was wearing something blue, a pullover of some kind. He had no conversation with this person and he left about fifteen seconds afterwards. As he walked along, he became conscious of somebody behind him in a blue pullover, whom he later picked out at an identification parade as the appellant. This man ordered him " in a menacing kind of way " to " keep on walking," and eventually directed him to a seat, where he told him he was a part-time police officer and a plain clothes officer, that he had been watching him all day, and had been in the Navy and was tight, and said: " Give me £3." The Major, according to his evidence, showed the stranger his wallet, which was empty, and was then made to turn out his pockets and hand over £1 18s., being put in fear of the appellant, and the appellant went away " like a flash of lightning," and the complainant,

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having got home and told his wife, reported the matter to the police within about half an hour. The complainant concluded his evidence-in-chief by saying that this same man, about a fortnight before, had made him hand over £2, also in a public lavatory, and he said he now realised what a great mistake on his part it was not to have reported that matter to the police.

The appellant, having been arrested, first told the police that he had an alibi, and then made a statement on Sunday, March 5, that is two days after the incident, under caution, which he signed, and that statement was to the effect that the money which he had received from the Major, which was 30s. and not 38s., was not received in the public streets of Folkestone, but in a public lavatory. He said he went down to the lavatory and that the Major, who was there, not only made indecent overtures to him which he, the appellant, repulsed, but also indecently assaulted the appellant by putting his hand over the appellant's private parts, and that the complainant then left the lavatory handing him 30s. with the words: "Don't go and say anything to anyone about it," in other words, voluntarily paid him 30s. as hush money. A little later he added an additional paragraph to the statement saying, amongst other things, that the complainant was a stranger to him, and he said then: "I forgot to say when he spoke to me up at the lavatory on the Leas the man touched my privates."

The appellant's defence at the trial was in accordance with his written statement, and it became obvious, first, that the burden on the prosecution was to prove (1) that the Major handed over the 38s. or 30s., as the case may be, and (2) he did so only because he was induced to do so by fear. The whole case for the appellant in accordance with his statement was that the money, 30s., was handed over without any request from the appellant, who had repulsed the overtures, but to keep his mouth shut. That was the defence which Mr. Parker, who represented him at the trial, was instructed to put forward. Of course, when the Major had told his story in evidence-in-chief in the witness box, it was the duty of Mr.

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Parker to put to him in cross-examination the version of how the money, whether 38s. or 30s., came to be handed over, the version given by the appellant of how that money came to be handed over at all, and the court is satisfied that every single question which may be said to have been an attack on the appellant was in fact a question which was necessarily put for the proper conduct of Mr. Parker's client's defence.

The Criminal Evidence Act, 1898, s. 1, provides: " Every person charged with an offence . . . shall be a competent witness for the defence at every stage of the proceedings . . . provided as follows . . .(*f*) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character unless," and I go to exception (ii) of (*f*): " he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character "—and now I come to the material words—" or the nature or conduct of the defence "—and I emphasise the words " the nature or conduct of the defence "—" is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

The questions put by Mr. Parker in cross-examining Major X were necessarily put to suggest to Major X that his version was completely false and that the true story was the one contained in the statement of the appellant. This involved putting to Major X (1) that he had made indecent overtures to him, and (2) that he had even committed an indecent assault upon him, which, of course, were imputations on the character of Major X. That having been done, Mr. Clapham asked to make a submission, very properly, in the absence of the jury, and the jury retired for the learned Recorder to consider whether Mr. Clapham's application should be granted. The application was that he should be allowed to cross-examine the appellant as to his character and previous convictions because the case fell

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within the words of sub-paragraph (*f*) exception (ii) of section 1 of the Act of 1898. The learned Recorder, having heard the authorities both on admissibility and on discretion, he held that the cross-examination was admissible.

In due course the jury returned, and questions were put, and I think I am right in saying that it was elicited in cross-examination that the appellant had three findings of guilt and three convictions for assault occasioning actual bodily harm and wilful damage, and one can imagine the highly prejudicial effect that would have on a person accused of robbery. In due course the learned Recorder summed up, and quite rightly told the jury not to allow the fact of the convictions to influence them. The jury retired, and they convicted the appellant, and the Recorder sentenced him to twelve months' imprisonment.

The Recorder was then asked to give a certificate for appeal under section 3 (*b*) of the Criminal Appeal Act, 1907, and he did so. The certificate, I am afraid, is not very enlightening because all it says is: "It is a fit case for appeal against conviction on a ground of appeal which involves questions of mixed law and fact." The notice of appeal in this case is no more enlightening, but the grounds on which this appeal has been conducted are twofold: first, and this is a pure question of law, that the evidence of the prisoner's past character was inadmissible; secondly, if, contrary to that contention, it should be held that it was in law admissible, the learned Recorder either failed to exercise his discretion at all in allowing it to be admitted or did exercise his discretion, but exercised it wrongly, having regard to the whole of the facts of the case.

So far as the point of law is concerned, this court is unanimously of opinion that it is bound by this court's previous decisions, namely, COOK (1959) 43 Cr.App.R. 138; [1959] 2 Q.B. 340, in which case five judges sat to consider the matter, and a later case which followed that decision in the year 1960, BROWN, reported in 44 Cr.App.R. 181.

In COOK's case (*supra*), after considering the conflicting authorities, HUDSON, 7 Cr.App.R. 256; [1912] 2 K.B. 464

and JENKINS (1945) 31 Cr.App.R. 1, on the one hand and TURNER, 30 Cr.App.R. 9; [1944] K.B. 463 and STIRLAND *v.* D.P.P., 30 Cr.App.R. 40; [1944] A.C. 315, on the other Devlin J. as he then was, delivering the judgment of the Court of Criminal Appeal of five judges, said this (43 Cr.App.R. at p. 145; [1959] 2 Q.B. at p. 347): " In our opinion, the difficulties created by this subsection are as a general rule best dealt with in accordance with the principle in HUDSON (*supra*) as applied in JENKINS (*supra*). The attempt to give the words a limited construction has led to decisions which it is difficult to reconcile; now that it is clearly established that the trial judge has a discretion and that he must exercise it so as to secure that the defence is not unfairly prejudiced, there is nothing to be gained by seeking to strain the words of the subsection in favour of the defence. We think, therefore, that the words should be given their natural and ordinary meaning and that the trial judge should in his discretion do what is necessary in the circumstances to protect the prisoner from an application of the subsection that would be too severe." A little later on—and I will deal with this because I shall come to the question of discretion—the learned judge said this: " It is well settled that this court will not interfere with the exercise of a discretion by the judge below unless he has erred in principle or there is no material on which he could properly have arrived at his decision." That decision, a decision of five judges of the Court of Criminal Appeal in 1959, followed by the decision of three judges of this court in BROWN's case (*supra*) in 1960, the court regards as binding on it and any reconsideration of the question of law must be left to the House of Lords.

In the result, therefore, this court holds that the learned Recorder was right in ruling that evidence of previous convictions and of the previous bad character of the appellant was legally admissible. Having come to that conclusion, he had to decide which way he should exercise his discretion, whether in the circumstances of the case he should allow the questions to be put or not. It is true that various authorities

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were cited to the learned Recorder—of course in the absence of the jury—in which it was mentioned that the judge had a discretion, that is to say, that the law for years—and of course the learned Recorder well knew it—has been that, if the evidence was legally admissible, he had a discretion to exclude it if he thought fit, *e.g.*, if he thought the prejudicial effect of the evidence would be disproportionate to its probative value. The question was not whether he knew he had a discretion but whether, before allowing the evidence to be admitted, he brought his mind to bear on the question whether, although legally admissible, it was desirable, having regard to the paramount consideration of having a fair trial, that it should be admitted.

As I have said, several cases were cited in which the existence of the discretion was made clear, and Mr. Parker, replying to Mr. Clapham's submission, said: " If those matters are an integral part of the defence, as so often in a case of rape they are, in my submission the court ought to exercise its discretion on the basis of not permitting questions to be put as to the character of the defendant." Then there came the learned Recorder's decision on the legal submissions, and he said this: " I have considered this matter; and I may say I started to consider it long before the question was raised, because I realised there was an imputation being made against the prosecutor here that he had been guilty of a criminal offence. Giving it the best consideration I can, I think the defence submission is quite wrong."

The defence had made two submissions, one, that the evidence was not legally admissible, and secondly that, if it was legally admissible, the Recorder should exercise his discretion in favour of the accused. To say that the submission was " quite wrong " was wholly inapplicable to the exercise of discretion. A little later on he said: " I think as soon as he puts the accused into the witness box to tell that story on oath "—that is, the story outlined in the statement—" that entitles the prosecution to say: ' Right—you say the prosecutor is a man of bad habits, therefore the jury should be told the

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character you are.'" "Entitles" is not normally the word to use for the exercise of a discretion and I emphasise the words "In those circumstances"—not, be it observed, "this evidence is admissible and in the exercise of my discretion, having applied my mind to the circumstances of this particular case, I propose to allow the convictions to be put," but, "this evidence is admissible, and the previous convictions can be put to the accused."

In the summing-up the learned Recorder said this: "In this case Mr. Parker has told you it is somewhat unusual that you should know so much about the accused person as you do. The only reason you were entitled to know that is because, when you were out of the court, I held the view, rightly or wrongly,—and if I am wrong in exercising my discretion it will be put right in a much higher hierarchy of the law—and I have ruled there was such an attack on the character of the prosecutor here in the suggestions made in the accused's statement that you were entitled to judge the prosecutor's character and measure it up against the character of the person who is accusing him, that is the prisoner; so you had the opportunity of hearing the sort of young man he is. Do not let those things influence you into finding him guilty."

This court has considerable doubt whether the learned Recorder did address his mind to the question of discretion at the only material time, that is to say, at the close of the submission and before the questions were put to the appellant. Assuming, however, that he did exercise his discretion at that time, this court is of opinion that he exercised his discretion wrongly in principle. This court is mindful of the remarks which I have already read of Devlin J., as he then was, in delivering the judgment of five judges of the Court of Criminal Appeal in the case of COOK (*supra*) and, indeed, it is a truism to say that any appellate court is slow to interfere with the exercise of a discretion by a judge unless they feel satisfied either that he exercised it on wrong principles or that he failed to give weight to matters which he should have had in mind when exercising the discretion. I have already

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emphasised that section 1 (*f*) exception (ii) refers to both the nature and conduct of the defence. Of course, the exercise of a discretion must depend entirely upon the facts of the particular case in which it falls to be exercised, but where, as in the present case, the very nature of the defence necessarily involves an imputation against a prosecution witness or witnesses, the discretion should, in the opinion of this court, be, as a general rule, exercised in favour of the accused, that is to say, the evidence as to his character or criminal record should be excluded. If it were otherwise, it comes to this, that the Act of 1898, the very Act which gave the charter, so to speak, to an accused person to give evidence on oath in the witness box, would be a mere trap, because he would be unable to put forward any defence, no matter how true, which involved an imputation upon the character of the prosecutor or any of his witnesses, without running the risk, if he had the misfortune of having a record, of his previous convictions being brought up in court while being tried on a wholly different matter. This court is of opinion that the discretion should have been exercised in favour of refusing the cross-examination as to previous convictions.

Finally, Mr. Clapham has suggested that this is a case in which the court should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. That would involve this court saying that without any reference to previous convictions a jury properly directed would without doubt have come to the conclusion that this appellant was guilty. The court is unable to take this view. In the circumstances, the appeal will be allowed and the conviction will be quashed and the appellant discharged.

Conviction quashed.

Solicitors: N. K. Cooper, Maidstone, for the Crown.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE PAULL AND
MR. JUSTICE HOWARD

GEOFFREY ANTHONY QUINN
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Disorderly House—Element of Common Nuisance Unnecessary—Indecent Performance or Exhibition—Ingredients which must be Proved—Film Alleged to Portray Part of Performance as Reconstructed—Admissibility.

A disorderly house need not amount to a common nuisance, and a charge of keeping a disorderly house may be preferred on a ground other than that of indecent performances or exhibitions.

Where, however, indecent performances or exhibitions are alleged to render premises a disorderly house, it must be proved that matters have been there performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency; or (b) tends to deprave or corrupt; or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment. These elements should not, however, be regarded as mutually exclusive, and a performance may well include all three.

On a charge of keeping a disorderly house based on indecent performances or exhibitions, defending counsel desired to adduce in evidence a film taken three months after the events complained of and alleged to portray the acts of three of the performers and asked that it should be exhibited in the precincts of the court, but the judge rejected the evidence as inadmissible.

Held, that the judge's decision was right, since evidence consisting of the reconstruction of an entire scene which had been brought into existence in private for the purpose of constituting evidence at a trial (as distinct from a description of a single incident by a witness in the witness box in the presence of the jury) could never be admissible.

Appeals against conviction (on certificate) and in the case of the appellant Bloom also against sentence.

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The appellants were convicted at the County of London Sessions, Bloom on February 14, 1961, and Quinn on April 14, 1961, of keeping a disorderly house and were sentenced by the Chairman (R. E. Seaton, Esq.), Quinn to a fine of £5,000 and an order to pay 500 guineas costs, and Bloom to a fine of £2,500 and an order to pay 100 guineas costs.

Edward Clarke, Q.C. (*Leonard Lewis* with him) for the appellant Quinn. In the present case it was necessary to show that the performance was calculated to corrupt and deprave or that it was obscene within the definition given by Cockburn C.J. in HICKLIN (1868), or that it constituted a common law nuisance, that is to say, an act not warranted by law which caused inconvenience or damage to the public. The Chairman misdirected the jury by failing to direct them that the offence of keeping a disorderly house could not be committed unless, first, the user of the premises constituted a common law nuisance and, secondly, the performance was calculated to deprave or corrupt. [ASHWORTH J. Surely if there was calculation to deprave or corrupt, there would be no need for common law nuisance?] [PAULL J. Was it not open to the jury to hold that the performance amounted to an outrage of public decency and thus amounted to a common law misdemeanour? That was what was indicated by Lord Reid in SHAW *v.* D.P.P., *ante*, p. 164; [1961] 2 W.L.R. 897.] It is submitted that the court should not enlarge the definition of a disorderly house further than has been laid down by the authorities. There appears to be no authority which says that an act which might be considered lewd and disgusting amounts to a common law misdemeanour except where the act was of an illegal nature. If the law is to be changed and widened, it should be done by Parliament and not by the decision of a court. In his summing-up the Chairman used a number of different words to describe the acts complained of—lewd, disgusting, debauching, depraved and obscene. This can only have confused the jury, who may have thought that they were entitled to convict if the performance were merely lewd and disgusting. The Chairman really adopted two standards: first, that it must be proved that the performance was filthy, lewd and disgusting, and secondly, that it must be proved to have been obscene in the sense of calculated to deprave or corrupt. At some points in the summing-up the two standards were used separately in relation to the acts dealt with and sometimes they were mixed together.

A further ground of appeal is that the Chairman refused to admit as evidence on behalf of the appellant a film depicting part of the performance alleged to have taken place. That film was probative evidence suitable to be put before the jury and could have been of assistance to the jury. In a civil case a judge is often shown how a piece of machinery works. [PAULL J. Are you not getting near the Continental practice of reconstruction?] [ASHWORTH J. Was not the matter within the judge's discretion? Has a defendant a right to demand that a jury see a film?] The Chairman did not have a discretion to exclude the film, as it would have shown the jury what took place during the performance, although admittedly it did not show what happened on the night when the offences were alleged to have been committed. It was for the jury to hear all the available evidence before they decided the case.

Sebag Shaw, for the Crown. " Disorderly " means something which disrupts the order of society, and on the authorities no intention to corrupt or element of nuisance is necessary. It had to be proved that on the premises there was an exhibition of matter which was indecent in the sense of being unfit to be exhibited on premises to which the public resorted. Applying the definition of disorderly house in BERG (1927) 20 Cr.App.R. 38, premises fall within that definition where matters are performed or exhibited of such a character that their exhibition or performance in a place of common resort amounts to an outrage of public decency or tends to corrupt or deprave or is otherwise calculated to injure the public interest so as to call for condemnation and punishment. Whether matters fall within one of those categories must ultimately depend on the opinion of the jury and no precise test can be laid down. An analogy may be found in cases of dangerous driving, where there is no precise test for the degree of negligence. Here the Chairman left the matter of degree to the jury and properly directed them by saying that, if they thought the performance merely lewd and disgusting, they should acquit, but, if something beyond that, they should convict. In any event, even if the summing-up is open to criticism in some respects, there has been no substantial miscarriage of justice.

On the second matter relied on by the defendant, if the evidence of the film was admissible at all, the judge had a discretion whether to admit it or not.

Edward Clarke, Q.C., replied.

ASHWORTH J. said that the court would give judgment in this appeal after the next appeal had been heard.

Christmas Humphreys, Q.C. (*James Burge* with him), for the appellant Bloom. Even if the definition of " disorderly house " given by counsel for the Crown be accepted, as, for the purpose of this argument, it substantially is, the direction of the Chairman was far from an accurate statement of the law and must have left the jury in considerable confusion. He confused a number of cognate offences such as nuisance, public mischief, obscenity and keeping a disorderly house, without any clear explanation of what was meant by obscene or a suggestion that it connoted corruption or depravity. He concentrated rather on the sexuality of the performers without considering the effect of the performance on the audience and did not make it clear that charges of this sort must be considered objectively and not subjectively. It is a minor ground of appeal that, after one jury had disagreed, the Chairman should not have retried the case himself, when there were three Deputy-Chairmen available. [ASHWORTH J. Supposing it would have been desirable for the retrial to have taken place before another judge, having made no application

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at the time, can you complain to this court?] I felt some embarrassment whether to mention the matter to the judge in person or to make an application in open court. [ASHWORTH J. We all feel that in a case of this sort it would have been desirable, but we are not criticising and we are going to say nothing more.] The court is respectfully asked to remember that, in the slow compilation of the common law, the judges do not lightly depart from the accepted meaning of words, and no persons would normally have referred to these premises as disorderly. If the court is asked to extend the law, the age of the law should be remembered and the fact that there are other laws in existence sufficient to prevent the alleged mischief.

Sebag Shaw, for the Crown. The jury were bound to look at the performance as a whole, but they were entitled to say that one particular item was so indecent as to infect the whole. The matter was one of degree, and the Chairman clearly directed the jury not to be prudes, but to consider the matter as men of the world and ordinary citizens, and told them that they were the final arbiters in a matter of this kind.

Christmas Humphreys, Q.C., in reply. In the present case the question of corruption was not sufficiently emphasised, and the jury may have retired with the impression that the issue which they had to resolve was whether the performance was lewd and disgusting.

ASHWORTH J. said that, for reasons to be given later, the court was of the opinion that both appeals against conviction must be dismissed, and also that the appeal of the appellant Bloom against sentence must also be dismissed.

Cur. adv. vult.

June 30. The judgment of the court was read by

ASHWORTH J. In each of these two appeals the appellant appealed to this court against his conviction and the appellant Bloom also appealed against the penalty imposed upon him.

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At the end of the hearing this court intimated that each appeal was dismissed, and that the court would give its reasons later. Each case was tried at the County of London Sessions before the learned Chairman, and in each case the charge was the same, namely, that the appellants unlawfully kept a disorderly house. Bloom's case was first heard in January, 1961, when the jury were unable to reach agreement, and was then re-heard in February, 1961. Both trials took place before the Chairman, and this court confirms the opinion, expressed during the hearing of the appeal, that it would have been better if the re-trial had taken place before one of the Deputy Chairmen. Quinn's case was heard in April, 1961, and after his conviction counsel obtained from the Chairman a certificate that the case was a fit case for an appeal upon two grounds: first, whether the Chairman's direction as to what constituted a disorderly house was good in law and, secondly, whether he was right in holding that a film of the alleged acts made three months after the matters the subject of the indictment was admissible in evidence. Quinn's appeal was heard first, and was followed by Bloom's appeal before any decision was given.

In each case the prosecution arose out of matters alleged to have occurred in the course of performances which took place at premises where the respective appellants carried on business as proprietors of clubs. These performances were what has come to be known as strip-tease performances, and it was not disputed that in some of the scenes actresses appeared either completely nude or practically so. In Quinn's case it was alleged that in six and possibly eight out of the seventeen acts constituting the programme matters occurred which far exceeded the limits which the law permits in performances of this sort: in Bloom's case the acts complained of related to five out of a programme comprising fourteen acts. Short descriptions of the matters complained of are to be found in the summing-up in each case, and it is unnecessary to set them out in detail. It is sufficient to say that, if the evidence of the police officers was reliable, the indecency involved was beyond question serious and, indeed, in some respects revolting.

Much of the argument before this court was directed to the question of what is meant by a " disorderly house." In so far as the expression has been used in Acts of Parliament, no statutory definition has been provided. Thus, in the Disorderly Houses Act, 1751, section 2 provides that any house, room, garden or other place kept for public dancing, music, or other public entertainment of the like kind in the Cities of London and Westminster or within twenty miles thereof, without a licence, shall be deemed a disorderly house or place. Section 5 of the same Act refers to a " bawdy house, gaming house or any other disorderly house," but provides no definition.

The offence of keeping a disorderly house is an offence at common law, but in none of the reported cases to which our attention was called does there appear a comprehensive definition or statement of what the prosecution has to prove in order to establish the charge. In some cases a prosecution has been successful as a result of proving that persons resorting to the alleged disorderly house were themselves taking part in illegal practices: see, for example, HIGGINSON (1762) 2 Burr. 1233 (" fighting of cocks, boxing, playing at cudgels and misbehaving themselves ") and BERG (1927) 20 Cr.App.R. 39 (" lewd and immoral persons assembled for the purpose of unnatural practices "). It was argued in Quinn's appeal that the misbehaviour or illegality on the part of persons resorting to the premises was an essential element in the offence of keeping a disorderly house and that, as the members of Quinn's club and their guests were respectable persons who were merely spectators at the performances and committed no indecency themselves, the premises could not in law be regarded as a disorderly house. We are quite unable to take so restricted a view of the meaning of the expression " disorderly house."

A further argument on behalf of Quinn was that unless the alleged disorderly house amounted also to a common nuisance, the charge must fail. Although the report of RICE (1866) L.R.

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1 C.C.R. 21 is exceedingly short, the decision itself is contrary to this argument, and Mr. Clarke did not press it. In our opinion, while a disorderly house may in some instances amount to a common nuisance, the latter element is not an essential ingredient in the offence of keeping a disorderly house, and it is unnecessary to consider the question of common nuisances further.

It is convenient at this stage to refer to the recent decision of the House of Lords in SHAW *v.* THE DIRECTOR OF PUBLIC PROSECUTIONS, *ante*, p. 113; [1961] 2 W.L.R. 897. Their Lordships' speeches were not delivered until May 4, 1961, after both the appellants had been tried and convicted, so that the learned Chairman did not have the advantage, afforded to us, of considering those speeches. In that case the material charge was not that of keeping a disorderly house but of conspiring to corrupt public morals, but in our opinion much of the reasoning of the majority is equally applicable to the present appeals. In reliance partly upon the decision in SHAW's case (*supra*) Mr. Sebag Shaw submitted a proposition which deserves to be recorded, particularly as both Mr. Clarke (for Quinn) and Mr. Christmas Humphreys (for Bloom) were content to accept it as a correct statement of principle: " A disorderly house is a house conducted contrary to law and good order in that matters are performed or exhibited of such a character that their performance or exhibition in a place of common resort (a) amounts to an outrage of public decency or (b) tends to corrupt or deprave or (c) is otherwise calculated to injure the public interest so as to call for condemnation and punishment."

Subject to two comments, we are of opinion that this statement of principle is correct in law. In the first place, in the two appeals now before us the whole essence of the charge against the appellants was that indecent performances had taken place, and it was in relation to such a disorderly house that Mr. Sebag Shaw's statement of principle was put forward. A charge of keeping a disorderly house may be preferred on some ground other than indecent performances and, in our

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opinion, the statement of principle must be regarded as limited to cases in which indecent performances or exhibitions are alleged.

Secondly, the statement contains three phrases expressed as alternatives which, for convenience, we have lettered (a), (b) and (c). In our view, these phrases should not be regarded as mutually exclusive; on the contrary, a case may well fall within all three. In this connection we refer to the following passage in the speech of Viscount Simonds (*ante*, at p. 148; [1961] 2 W.L.R. 897): "It matters little what label is given to the offending act. To one of your Lordships it may appear an affront to public decency; to another considering that it may succeed in its obvious intention of provoking libidinous desires, it will seem a corruption of public morals. Yet others may deem it aptly described as the creation of a public mischief or the undermining of moral conduct. . . . When Lord Mansfield speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendence of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare."

Mr. Christmas Humphreys on behalf of Bloom strenuously contended that charges of this sort must be considered objectively and not subjectively. As we understood it, his argument was that a juror should be directed to put on one side his own personal feelings on the matter and approach it objectively. If the words " subjective " and " objective " are introduced into the discussion at all (which for our part we deprecate as they so often lead to confusion), we think that any juror's view must be subjective to him, though he should be warned (as these jurors were) that he must approach the matter as an ordinary reasonable citizen putting on one side as far as possible any particular prejudice he may have. Once again we quote from SHAW's case (*supra*), in which each member of the majority referred to juries, and (*ante*, at p. 180; [1961] 2 W.L.R. at p. 940 Lord Hodson said: " Since a criminal indictment is followed by a verdict of a jury it is true that the function of *custos morum* is in criminal cases ultimately performed by the jury, by whom, on a proper direction, each case will be decided. This, I think, is consonant with the course of the development of our law. . . . In the field of public morals it will thus be the morality of the man in the jury box that will determine the fate of the accused but this should hardly disturb the equanimity of anyone brought up in the traditions of our common law."

Before we deal with the summing-up in either case, we should dispose of the second question raised in Quinn's certificate of appeal, which relates to the admissibility in evidence of a film taken three months after the events complained of. There were no doubt cogent reasons why the film could not be taken at an earlier date, but they do not in the least affect the question of admissibility. Mr. Clarke's first application at the trial was that the jury should be allowed to see the film at the appellant's premises, but the Chairman rightly rejected this suggestion, and Mr. Clarke then applied that the film should be exhibited within the precincts of the court. The film was intended to portray what three of the performers actually did in the course of their acts, and evidence was apparently available to the effect that the performances shown in the film were identical with the performances on the occasions complained of. The Chairman rejected the evidence on the ground that it was inadmissible, and we agree with this. The film was in essence a reconstruction of the alleged crime and, quite apart from the interval of three months, we think that evidence of this type is inadmissible.

It is, of course, true that demonstrations are frequently given by witnesses in the witness box to show what was done at the material time. For example, the way in which a blow was struck is often demonstrated, but such demonstrations usually take place in the witness box, take place in the presence

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of the jury, and are intended to illustrate one act. In our view, such demonstrations are altogether different in character from a reconstruction of an entire scene, a reconstruction which has been brought into existence in private for the purpose of constituting evidence at a trial. It is obvious that to allow such a reconstruction would be introducing a method of proof which would be most unsatisfactory for the reason that it would be almost impossible to analyse motion by motion those slight differences which may in the totality result in a scene of quite a different character than that performed on the night in question. Indeed, in this case, it was admitted that some of the movements in the film (for instance, that of a snake used in one scene) could not be said with any certainty to be the same movements as were made at the material time. In our judgment, this objection goes not only to weight, as was argued, but to admissibility: it is not the best evidence.

The learned Chairman's summing-up in each case was subjected to considerable criticism. In fairness to him it should be mentioned that no complaint was or indeed could be made either as to his direction on the burden of proof or as to his summary of the relevant evidence. The complaints related to his direction on the main issue, namely, what is meant in law by keeping a disorderly house. In Bloom's case there are two passages, one at the start and the other at the end of the summing-up, where the learned Chairman was in effect giving a general direction on law. In the first passage he said: " If you come to the conclusion on the facts that what was being portrayed here was obscene, lewd, disgusting, lascivious, and so on, then that conduct would amount to a public mischief, that is to say, conduct against ordinary decent public ethics. If that were so, it would be a public mischief." In the later passage he said: " Now you have got to make up your minds, as ordinary commonsense people, what was going on. Was it lewd, obscene, something which would disgust you as ordinary reasonable citizens? because if it was then that would be bawdy conduct and . . . that would be a disorderly house." It is true that in the course of this summing-up the definition of " obscene " now incorporated in the Obscene Publications Act, 1959 (having a tendency to deprave and corrupt), was not brought to the notice of the jury, although the word itself was used several times. But while in our view as a general rule it is desirable to mention the definition, if the word " obscene " is used, the omission on this occasion was not, in our view, of any great consequence. In our view, the effect of the passages which we have cited was to present the issue to the jury in a form consistent with the principles to which we have already referred, and we see no reason to suppose that the jury failed to understand their task.

In Quinn's case the learned Chairman used slightly different language in directing the jury what is meant by a disorderly house. At the start he said: " There is a great variety of disorderly houses, but so far as this case is concerned if you come to the conclusion that this place, this club, consisted of premises upon which there were performed acts of a lewd, disgusting, depraving and debauching nature, that would constitute a disorderly house, because those sort of things going on on premises of that sort would be against public policy, against the common law which is the etiquette of this country. Here the prosecution go further, because they say that not only was this performance disgusting, lewd and lascivious, but it was also obscene. For a performance to be obscene means something which tends to corrupt or deprave." In this passage he was drawing a distinction between the phrases which we have lettered (a) and (b) in Mr. Sebag Shaw's statement of principle, and in our view the earlier part of this passage is consistent with the phrase lettered (a) and possibly with the phrase (b). In any event, we are of opinion that in this passage the issue was presented to the jury with sufficient clearness for them to appreciate what the charge involved. But having drawn this distinction at the start of his summing-up, the learned Chairman used the word " obscene " on a number of occasions, and then concluded by saying: " Are you driven to the conclusion that what was taking place night after night in that club was a filthy, obscene, lewd, disgusting, corrupting and depraving show? If it was, then you ought to convict. If there is any reasonable doubt about it, then he ought to be acquitted." In this passage the learned Chairman, in contrast with the earlier passage, made obscenity an essential element and to that extent may be said to have been confusing. But in our view if it was confusing at all, it was confusing in the appellant's favour as the issue left at the end of the summing-up involved a finding of obscenity if the appellant was to be convicted. We venture to emphasise the danger of multiplying offensive adjectives, the result of which may be to expose the summing-up to criticism which it does not really deserve. In our view, as in Bloom's case, the substance of the summing-up was correct, and we can see no reason to set aside the conviction of Quinn.

There remains Bloom's appeal against sentence. He was fined £2,500 and ordered to pay 100 guineas costs, the Chairman saying to him: " You went into this with your eyes open, I am quite satisfied." So are we. The brochure issued by Bloom speaks for itself: " We guarantee to members and their guests the spiciest evening of their lives." It is true that the offending scenes were cut out as soon as the police complained, but in our view the penalty imposed was amply justified, not least as a deterrent to others who may be minded to exploit what is said to be a current craze for strip-tease.

Appeals dismissed.
Leave to appeal to the House of Lords was refused.

Solicitors: Stanley Levene, for the first appellant; Kingsley Napley & Co., for the second appellant; Solicitor for Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE ASHWORTH AND MR. JUSTICE PAULL

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Sentence—Consecutive Sentences—Total of 42 *Years' Imprisonment.*

Where an indictment contains a number of counts each alleging a separate and distinct offence, the discretion of the judge in passing sentence is not limited so as to prevent him from passing consecutive sentences which will total more than the maximum permitted for any one of the offences taken by itself.

Consecutive sentences totalling forty-two years' imprisonment for offences against section 1 (1) (*c*) of the Official Secrets Act, 1911 (1 & 2 Geo. 5, c. 28) (as amended) affirmed.

Application for leave to appeal against sentence.

The applicant pleaded Guilty at the Central Criminal Court on May 3, 1961, on five counts charging offences against section 1 (1) (*c*) of the Official Secrets Act, 1911 (as amended) and was sentenced by the Lord Chief Justice to fourteen years' imprisonment on each count, the sentences of the first three counts to be consecutive and the remaining two concurrent.

The first count charged the applicant that in November 1951; the second that between September 1, 1953 and April 13, 1955; the third that between April 14, 1955 and April 3, 1959; the fourth that between May 4 and June 14, 1959; the fifth that between June 15 and September 17, 1959; for a purpose prejudicial to the safety of the State he communicated to another person information which might have been directly or indirectly useful to an enemy.

Jeremy Hutchinson, Q.C. (*W. McHoward* with him), for the applicant. To pass consecutive sentences of fourteen years' imprisonment was wrong in principle. The sentence was inordinate, unprecedented and manifestly excessive. The

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maximum penalty for a single act of spying has never been more than fourteen years. Apart from sentences of death and life imprisonment and a maximum sentence of twenty years' imprisonment under the Explosive Substances Act, 1883, the maximum sentence for any criminal offence is now fourteen years' imprisonment. The reason why that figure was selected is to be found in an examination of the meaning of life imprisonment in the light of established practice. Life imprisonment has never been literally interpreted and today means twenty years' imprisonment with remission. Under section 27 (1) of the Prison Act, 1952, the Secretary of State has a power of review in respect of life sentences, and in recent years the normal term of imprisonment actually served has been ten years. It is wrong in principle to pass a sentence which by far exceeds what is normally understood by life imprisonment and which deprives the applicant of the protection of review by the Home Secretary, which the applicant would have had if he had been sentenced to life imprisonment. In the past fifty years, except for one recent case under this same Act, no one has been sentenced to more than twenty years' imprisonment and there is no recorded case of anyone serving more than twenty years. Whatever may be the propriety of passing consecutive sentences in normal circumstances, to pass consecutive sentences of fourteen years in this case was to evade the limit laid down by Act; for had it been possible to impose a life sentence, not more than twenty years at the utmost would have been served.

In FUCHS (*The Times*, March 2, 1950), the prisoner, who pleaded guilty to four charges under this same Act, was sentenced by the Lord Chief Justice (Lord Goddard) to fourteen years and the question of consecutive sentences was never considered. A sentence of this length cannot be administered. It is the policy of the Prison Commissioners and the Home Office not to keep a man in prison so long that his deterioration, mental and physical, will prevent him from returning to the life of the community at any time. This sentence was so inhuman as to be alien to the principles of punishment in a civilised country. It is doubtful whether any person could be expected to survive a sentence of more than twenty years, and there is no place where such a sentence can be served. Further, there were in this case some circumstances of mitigation which the judge should have taken into consideration.

The Attorney-General (*Sir Reginald Manningham-Buller*, Q.C., *Mervyn Griffith-Jones* with him), for the Crown. A court clearly has power to impose consecutive sentences and it is within the discretion of the court to do so. No principle has been established that it is wrong to sentence a person to a term of imprisonment longer than would actually be served if he had been sentenced to life imprisonment.

Jeremy Hutchinson, Q.C., replied.

At the conclusion of the argument Hilbery J. said that the application would be dismissed and that the court would give its reasons later.

Cur. adv. vult.

July 3. The judgment of the court was delivered by

Hilbery J. This was an application for leave to appeal against sentence, and the only ground put forward in the notice of application was that the sentence was too severe. The applicant pleaded guilty at the Central Criminal Court to each of the five counts in an indictment charging him in each count with an offence under section 1 (1) (*c*) of the Official Secrets Act, 1911, as amended. Each count alleged a specific and separate offence committed at some particular time during the period between 1951 and 1959. The Lord Chief Justice passed sentences of fourteen years on each of the first three counts and fourteen years on the fourth and fifth counts, making the first three sentences of fourteen years consecutive and the sentences on the last two counts concurrent with the sentences on the first three. The total sentence was, therefore, one of forty-two years. It is that sentence of which the applicant complains that it is too severe.

On his behalf it was expressly stated by Mr. Hutchinson that his application for leave to appeal against that sentence was not based on any point of law, and the application did not, therefore, involve a question of law. His contention was that the sentence was wrong in principle and, furthermore, in the particular circumstances of this case was manifestly excessive. In support of the argument that the sentence was wrong in principle his contention in the first place was that section 8 (1) of the Official Secrets Act, 1920, provided a maximum sentence of fourteen years for an offence against the Act such as was alleged in each of the counts in this indictment, and that to pass consecutive sentences of fourteen years was to evade the limit in the Act. The answer to this is that there is no settled principle that a judge may not pass consecutive sentences in respect of a number of offences for any one of which the maximum is fourteen years where each offence charged in each count is separate and distinct. Whether the sentences shall be concurrent in such circumstances or consecutive is a matter for the judge to determine in the exercise of his discretion. This discretion is not limited so as to prevent the judge awarding consecutive sentences which will total more than the maximum permitted for any one of the offences taken by itself.

Mr. Hutchinson pressed upon us evidence given by the Home Office before the Royal Commission on Capital Punishment, which showed that, where a life sentence is now passed, it is usual for the Home Office, indeed he put it as high as the normal practice of the Home Office, in the exercise of the powers given to the Home Secretary under section 27 (1) of the Prison Act, 1952, to release on licence any prisoner on whom is passed a sentence of life imprisonment after ten years, and that, as that was so, no court ought by making sentences consecutive to pass a sentence which would be longer than the one which he would in practice serve if sentenced to life imprisonment. One answer to this is that where, as in the case of non-capital murder, the statute enacts that the sentence shall be one of life imprisonment, this court passes that sentence giving the words of the statute their natural and ordinary meaning, and that sentence remains the sentence upon the prisoner, the Home Secretary having no power to alter it. The only power, under section 27 of the Prison Act, 1952, which the Home Secretary has is power to release the prisoner on licence with power, however, to recall him at any time to serve the rest of his sentence. The sentence remains what it is, one for life. Furthermore, this court, in passing such a sentence, has no regard to the possibilities of the exercise by the Home Secretary of his power to let a prisoner out on licence. It has been laid down by this court that in passing sentence a court should not pay any regard to the fact that nowadays a prisoner serving his sentence by good conduct may earn remission, so that he may in practice be confined to prison for a much shorter time than the length of sentence passed upon him, and there is no logical distinction between taking into consideration the possibility of remission for good conduct and the possibility of remission through the Home Secretary's exercising his discretion to allow out on licence and to shorten the period of a prisoner's confinement.

Mr. Hutchinson also pressed upon us the case of FUCHS (*The Times*, March 2, 1950), but the circumstances in that case, so far as one can judge from the report, were entirely different from those in the case we have under consideration. It is true that in that case the learned Chief Justice (Lord Goddard), who was passing sentence, made it fourteen years on each count concurrent, himself remarking, however, that for a man of high education and ability, punishment as such did not mean a great deal. It has been said, rightly, that in passing sentence a judge has to consider the offence and the offender, but he has also to consider the interest of society. When this applicant and his conduct and the particular circumstances of this case as they have been revealed to us are considered, FUCHS' case (*supra*) is clearly not comparable to this one.

It was further argued that sentences totalling forty-two years could not be administered, in that no person is capable of serving so long a sentence or, indeed, any sentence in excess of twenty years. We are quite unable to accept the premises

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upon which this argument is based, nor can we accept the further contention that there is no suitable prison where the applicant can serve his sentence. The age of the applicant and his capacity to serve the sentences imposed upon him were doubtless considered by the Lord Chief Justice, and we see no reason to interfere with his conclusion upon these matters.

Disinclined as we are to act otherwise than in public, we thought it right, more especially as the second ground upon which the application was based was that, in the particular circumstances of this case the sentence was manifestly excessive, to hear part of this application *in camera*, because there were matters included in the applicant's statement to which Mr. Hutchinson wished to allude, but which we were satisfied it would be prejudicial to the interests of the State to have mentioned in public. This course could not in any way prejudice the applicant. These matters could be put before this court just as well in closed as in open court, and it is this court and not the public that the applicant has to satisfy that the sentence passed upon him should be reduced.

We listened very carefully to all that was said on behalf of the applicant. Amongst other things, it was pointed out that the Chief Justice accepted, as we do, that Blake took no money for the traitorous services which he rendered, that, when a prisoner in Communist hands, the only books provided for him and his fellow-prisoners were the works of Karl Marx, Engels, Lenin and Stalin, and that so great was the boredom of captivity that he read them and other Russian literature devoted to disparaging the way of life of this country and the West and preaching salvation by Communism until at last he succumbed and decided to dedicate his life to the cause of Communism. When he returned to this country he did not, as one would have expected if he had a shred of honesty, resign from the service and pay of this country. So poisoning to him was the doctrine he had accepted that he decided to remain in the pay and service of this country and by every means in his power to betray it and by that method to help the cause he had secretly espoused. From then onwards for

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nine years, not once, but on every occasion when he had it in his power to do harm to this country and his fellow citizens he did it by betraying secret information of great importance. In his own words, " There was not an official document of any importance to which I had access which was not passed to my Soviet contact." We repeat, because it accurately represents our view, the words of the Chief Justice when he said: " Your case is one of the worst that can be envisaged in times of peace."

It is of the highest importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held by all ordinary men and women in utter abhorrence, but should receive when brought to justice the severest possible punishment. This sentence had a three-fold purpose. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country.

Application refused.

Solicitors: Claude Hornby & Cox, for the applicant.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE ELWES AND
MR. JUSTICE THESIGER

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JOHN JAMES BUGGY

Separate Trials—Principal and Accessory after the Fact Indicted Together—Statement by Accessory Prejudicial to Principal—Discretion of Judge.

Where persons are indicted together as principal and as accessory after the fact, and the accessory has made a statement prejudicial to the principal, there is no obligation on the judge to order separate trials.

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Where persons are charged as joint offenders, whether as principals or as principal and accessory before or after the fact, it is a matter for the discretion of the judge, which must be exercised judicially, giving consideration to the interests of justice as well as to the interests of the prisoners, whether there should be a joint trial or separate trials.

GRONDKOWSKI (1946) 31 Cr.App.R. 116 followed.

Appeal against conviction and application for leave to appeal against conviction.

The appellant was convicted at the Central Criminal Court on January 30, 1961, of assault occasioning actual bodily harm and shooting with intent to do grievous bodily harm and was sentenced by Fenton Atkinson J. to terms of imprisonment totalling nine years.

The appellant was indicted as a principal and two other persons named Powick and Cracknell were charged in the same indictment as accessories after the fact. These two persons had made statements to the police in which it was alleged that the appellant had told them that he had shot Reeder (the person named in the indictment as the victim).

C. L. Hawser, Q.C. (*J. Richards* with him), for the appellant. Where one co-prisoner has made a statement highly prejudicial to another co-prisoner, the judge should, as a matter of principle, order separate trials where the two are not jointly indicted as principals. The decision in GRONDKOWSKI (1946) 31 Cr.App.R. 116 that the judge has a discretion whether to order a joint trial or separate trials applies only to a case where the co-prisoners are jointly indicted as co-principals, not to a case where they are indicted together as principal and accessory after the fact. In any event, on the facts of this case, even if it were a matter of discretion, the judge exercised his discretion wrongly in ordering a joint trial. Further, the summing-up was unsatisfactory in that the judge did not clearly explain to the jury that the statements made by Powick and Cracknell could not be evidence against the appellant.

Mervyn Griffith-Jones and *J. C. Mathew*, for the Crown.

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Ashworth J. This appellant, John James Buggy, was convicted on January 30, 1961, at the Central Criminal Court, first, of assault occasioning actual bodily harm, and secondly, of shooting with intent to do grievous bodily harm. The trial had occupied some five days, and in the dock with him were two men, Powick and Cracknell, who were charged with being accessories after the fact to shooting. As the result of his conviction this appellant was sentenced to terms of imprisonment totalling nine years, and he applies to this court for leave to appeal against that sentence, having already been given leave to appeal against conviction.

The facts may be shortly stated. On the night of September 24–25, 1960, there was an incident in a night-club off Piccadilly, London, known as the Pigalle Club. There appears to have been some sort of disturbance back stage, and then as the trouble developed the case for the prosecution was that outside the club the present appellant, Buggy, shot a man named Reeder, who was his companion in the trouble that had arisen. Immediately after the shooting the appellant disappeared from his then known address. Some two days later he deposited his luggage at the premises then occupied by the accessories. With their assistance he made efforts to obtain a passport in a false name, and then eventually was apprehended by the police, as were the two alleged accessories. All three men made statements. It is said that the statement made by the appellant was equivocal. It certainly was not an out-and-out denial, and as regards the statements made by the other two, there was in them an unqualified admission that the present appellant had told them that he, the appellant, had shot the man Reeder. Accordingly, those statements made by Powick and Cracknell were prejudicial to the case put forward on behalf of Buggy.

It is said that, apart from those statements, there was very little in the events that occurred after the shooting on which the prosecution needed to rely and, so far as the two accessories were concerned, there was practically no other evidence which would have implicated them in the offence with which they were charged. In those circumstances, counsel then appearing for the appellant applied to the learned judge to order that the two accessories should be tried separately from the present appellant, and it is right to say that the transcript reveals that that argument was fully and carefully presented both for the appellant and for the Crown, and was undoubtedly carefully considered by the learned judge, although he did not think it necessary to give detailed reasons for his decision.

The point this court desires to emphasise is that the whole of the relevant authorities were placed before the learned judge as material in order to assist him to exercise his discretion, and there is no doubt he had them in mind when he decided to refuse the application for separate trials. It is now said, and put in the forefront of this appeal, that the refusal of separate trials was wrong.

The submissions are, in effect, based upon certain propositions, some of them depending upon the particular facts of this case and some of them general. At one time it appeared that Mr. Hawser, for the appellant, was arguing that in no case where an accessory after the fact is indicted together with the alleged principal, and the alleged accessory had made a statement prejudicial to the principal, can a joint trial properly be ordered. He submitted that if there is such a prejudicial statement made by one man to the detriment of his co-accused, unless the pair of them are jointly indicted as principals, the court should as a matter of principle order separate trials. No authority was cited which would bear out this proposition and, in the opinion of this court, it is wrong. The true principles applicable to this sort of case, whether the parties in the dock are charged as joint offenders, that is to say, as principals, or whether they are indicted as principal and accessory before or after the fact, have been fully considered by this court in GRONDKOWSKI (1946) 31 Cr.App.R. 116. It is true that in that case there was a joint indictment of two men as principals, but, in the opinion of this court, although there is no authority, so far as the researches of counsel have

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been able to assist us, which lays down in terms that the same principles are applicable when an accessory is charged, we take the view that the principles in GRONDKOWSKI's case (*supra*) are applicable in any event. At p. 120, Lord Goddard C.J., said this: "The law is, and always has been, that this is a matter of discretion for the judge at the trial. The court so stated the law in this very case, and quite recently in YOUTH [1945] W.N. 27, the Judicial Committee said that the question of joint or several trials had always been left to the discretion of the presiding judge. The discretion, no doubt, must be exercised judicially, that is, not capriciously. The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that 'the interests of justice' means only 'the interests of the prisoners.' If once it were taken as settled that every time it appears that one prisoner as part of his defence means to attack another, a separate trial must be ordered, it is obvious there is no room for discretion and a rule of law is substituted for it. There is no case in which this has ever been laid down, and in the opinion of the court it would be most unfortunate and contrary to the true interests of justice if it were." The only addition which this court would venture to make to that quotation from GRONDKOWSKI's case is in regard to that last sentence. It is, we venture to repeat, a question of discretion in each case. No doubt, in deciding how to exercise the discretion, the learned judge will carefully consider the interests of the accused man, but he has also other matters to consider. As was said later on in the judgment from which the citation has just been made (at p. 120): "It is not enough to say that counsel could have defended them more easily if they had been tried separately."

Accordingly, this being a matter of discretion, this court, as has been said over and over again, will only interfere with the exercise of the discretion if it is satisfied that the learned judge proceeded upon some wrong principle. So far from being satisfied to that effect, we take precisely the contrary view. This was a matter where, in our view, not only was the

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learned judge entitled to refuse the application for separate trials, but was right in so refusing.

The other point which was raised by Mr. Hawser takes the form of the comment that the summing-up was inadequate in that the learned judge failed in the special circumstances of the case to direct the jury with sufficient clarity as to the inadmissibility against Buggy of statements made by Powick and Cracknell. It could not be suggested for a moment that the learned judge failed to give any direction. In a passage which I need not read at length at pages 24–25 of the summing-up it is shown that the learned judge had the point well in mind and, if this court may respectfully say so, that paragraph, which was read in full, is a model of clarity. No jury could possibly be misled by anything that the learned judge said then or thereafter in his summing-up. He drew, as was right, a plain distinction between a statement made by an accused man to the police and evidence which that accused man might thereafter give in the witness box. This further ground, which it is only fair to Mr. Hawser to say he did not appear to press with very great confidence, is, like the first, without foundation. Accordingly, the appeal against conviction is dismissed.

It is then said that the sentence of nine years' imprisonment is excessive. It is perhaps worth repeating what the learned judge said when passing sentence: "The jury have acquitted you of the most serious charge of shooting with intent to murder, but have found you guilty of shooting Reeder with intent to do him serious injury, and also of the assault upon Clarke which, by comparison, is a minor matter. It is really quite clear that but for the mercy of Providence you would have been standing there on a charge of capital murder." So he would. This gun was fired a matter not of yards, but of feet, point blank into the stomach of the victim. The learned judge went on: "Although you have not got previous convictions, except those two in your youth years ago, I am bound to treat this as an exceptionally serious case and a grave crime." This court endorses every word of that last paragraph,

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and sees no reason to interfere with the sentence. The application for leave to appeal against sentence is likewise dismissed.

Leave to appeal to the House of Lords was refused.

Appeal dismissed.

Solicitors: T. W. James & Mallows, for the appellant.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE ELWES
AND MR. JUSTICE THESIGER

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PESSUMAN METHARAM

Summing-up—Grievous Bodily Harm—Use of Old Definition—Misdirection.

It is a misdirection now to use the old definition of "grievous bodily harm," *i.e.*, "harm that seriously interferes with health or comfort."

D.P.P. *v.* SMITH (1960) 44 Cr.App.R. 261; [1961] A.C. 290 followed.

ASHMAN (1858) 4 F. & F. 88, not followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on February 10, 1961, of wounding with intent, and was sentenced by the Commissioner (Judge Block) to thirty months' imprisonment.

The appellant, after a dispute with a prostitute, injured her with a knife, with the result that seventeen stitches had to be inserted in her cheek, right thumb and right ring finger. His defence at the trial was that the infliction of the injuries was accidental. The Commissioner directed the jury: "'Grievous bodily harm' . . . is defined in the book as not

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necessarily either permanent or dangerous, but harm that seriously interferes with health or comfort. That is sufficient."

A. C. L. Lewisohn, for the appellant. The Commissioner in his summing-up adopted the old definition of "grievous bodily harm" based on ASHMAN (1858) 4 F. & F. 88, but that has recently been disapproved in D.P.P. *v.* SMITH (1960) 44 Cr.App.R. 261; [1961] A.C. 290. In the circumstances of the present case that was a misdirection. The facts of the present case differ considerably from those of D.P.P. *v.* SMITH (*supra*). In that case, if the intent was established, it must have been at least an intent to do grievous bodily harm, whereas in the present case it would have been open to a jury on the facts to take the view that no specific intent had been established and that the offence amounted to unlawful wounding only, if they rejected the defence of accident.

R. I. S. Bax, for the Crown. It is conceded that as a result of the decision in D.P.P. *v.* SMITH (*supra*) it is now unnecessary, and indeed, inadvisable to add to the words "grievous bodily harm" in directing the jury; but the direction in the present case cannot be regarded as so wrong as to amount to a misdirection. It was, at the most, inadvisable. In any event, the injuries inflicted were such that no reasonable jury could have failed to convict of wounding with intent to do grievous bodily harm, even if the direction which is criticised had not been given, and it is submitted that this is a case where, if the court is of opinion that there has been a misdirection, they should apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

ASHWORTH J. This appellant, Pessuman Metharam, was convicted at the Central Criminal Court of wounding with intent, and he was sentenced by the learned Commissioner to two and a half years' imprisonment. By leave of this court he now appeals against that conviction.

The victim was a prostitute, and the incident out of which the charge arose occurred in her premises. They had had

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trouble together, and on the day in question, according to her, at her flat she saw him coming up the stairs, and he asked to see her for about five minutes. They went into the lounge, and he said: "I want you to come back to me," to which she replied: "I will never do that." He said: "If you don't, I'm going to kill you," and she picked up the telephone and started to telephone the police. Then she felt something go round her neck, and it was tight. She put her fingers underneath and managed to get it off. She then saw him take a knife out of his pocket. She had seen that knife previously when it was used as a vegetable knife. Then, to quote her description of the incident: "He tried to pull my head back. He had the knife in his left hand. I saw him raise the knife and I put my hands out to try and stop it." That was her version, and it was not disputed that somehow that woman sustained injuries which, it is fair to say, were not as serious as they might well have been considering the respective size of the man and girl and the weapon he used, but they did involve the insertion of five stitches on her cheek, six more stitches in her right thumb and another six in her right ring finger, in all seventeen stitches.

His defence at the trial was that the infliction of these wounds was accidental, and that was the issue between the parties, whether it was deliberate or accidental, the charge being one of wounding with intent to cause her grievous bodily harm.

When it came to the summing-up the learned Commissioner directed the jury in the terms of what one may conveniently call the old-fashioned definition of grievous bodily harm. It was a definition that was taken from ASHMAN (1858) 4 F. & F. 88, but the learned Commissioner omitted to direct the jury having regard to the comments made by the House of Lords upon that earlier decision in the case of DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH (1960) 44 Cr.App.R. 261; [1961] A.C. 290. What the learned Commissioner said was: "Grievous bodily harm, about which Mr. Haines has just been addressing me, is defined in the book as not necessarily either permanent

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or dangerous, but harm that seriously interferes with health or comfort. That is sufficient." Then, having called attention to her injuries, he said: "It is a matter for you to decide whether you consider that number of stitches is very serious interference with a person's comfort at all events. The definition is serious interference with health or comfort."

It is said with force by Mr. Lewisohn on behalf of this appellant that in the circumstances of this case that was a misdirection. He points out that the facts of the case are distinguishable from those in the case of DIRECTOR OF PUBLIC PROSECUTIONS *v.* SMITH (*supra*), which went to the House of Lords, because in that case, as the Lord Chancellor pointed out, there was really no room for a contrary view about grievous bodily harm; if there was the intent, the intent was at least to do that; but in this case, as Mr. Lewisohn says, it would have been possible for a jury to take the view that there was no intent to do grievous bodily harm, that is to say, really serious bodily harm, but that there was merely the crime of unlawful wounding, always assuming that it was not an accident. It is said on the other side that, while no doubt, as the result of the decision in SMITH's case (*supra*) it is unnecessary and, indeed, inadvisable to add anything to the words "grievous bodily harm," nonetheless the direction given in this case cannot be called a misdirection; it was a direction which in the light of the authorities, though regarded as inadvisable, was not wrong.

In the view of this court, as a result of the decision in SMITH's case (*supra*) and certainly as applied to the facts of the present case, it is a misdirection of the jury to adopt the old formula and invite a jury to find a man accused of wounding with intent to do grievous bodily harm guilty if the only intent established is one to interfere seriously with health or comfort. Reading the speech of the Lord Chancellor as a whole, it seems to follow that, certainly as applied to this case, the adoption of the old formula is one that amounts to a misdirection. It is a legitimate inference from the closing paragraphs of that speech that were it not for the fact that in SMITH's case (*supra*)

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the learned judge on three other occasions had referred in terms to the serious character of the offence, they would have held that the adoption of the old formula was a misdirection. At any rate, the view of this court is that in this case the direction given to the jury at the start of the summing-up, which was not followed by any further description of the ingredients of the offence, was a misdirection.

But that does not conclude the matter. As has already been said, the issue before the jury in essence was whether this was an accident or whether they accepted the girl's story. We take the view, not accepting Mr. Lewisohn's submission on this point, that if the jury came to the conclusion that the girl's story was right, the intent to do grievous bodily harm was really the only verdict that a reasonable jury could reach. After all, he had attempted, as it appears, to strangle her, and then he drew a knife. He had said he would kill her and he pulled her head back with the knife in his left hand. It was because of her struggle that she escaped with relatively light injury, but the issue before the jury was the intent in the mind of the appellant when he inflicted the wounds upon her. In our view, this is a case in which the proviso can and should be applied. In so far as we hold that there was misdirection, we think that there was no substantial miscarriage of justice, and this appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: G. Dowse & Co., Hackney, for the appellant; The Solicitor, Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE THESIGER
AND MR. JUSTICE MEGAW

JOSEPH ALBERT ATTFIELD

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Summing-up—Duty of Judge to Refer to Evidence—Burden of Proof.

In a complicated and lengthy case it is the duty of the judge to refer to the salient points of the evidence in his summing-up, but in a short case and one in which the issue of guilt or innocence can be simply and clearly stated it is not necessarily a fatal defect to a summing-up that the evidence has not been discussed.

Observations on the necessity for a clear direction on burden of proof.

Appeal against conviction.

The appellant was convicted at Portsmouth Quarter Sessions on April 4, 1961, of indecent assault on boys and gross indecency and was sentenced by the Recorder (J. Scott Henderson, Esq., Q.C.) to concurrent terms of nine months' imprisonment.

At the close of the case for the prosecution on March 30, the Recorder invited the jury to stop the case, but the jury expressed a desire that the case should proceed. On April 4, after the Easter holiday, the trial was resumed and the appellant and two witnesses were called for the defence. In a summing-up which lasted twenty-five minutes the Recorder did not review the evidence except with regard to the appellant's character.

H. J. M. Tucker, for the appellant. The summing-up was defective in two respects. In the first place the Recorder made no attempt to review the evidence, and in a case of this nature it was essential that he should. Secondly, there was no clear

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direction on burden of proof. The Recorder never directed the jury that they must feel sure before they decided to convict or that the case must be proved beyond reasonable doubt.

J. H. Inskip, for the Crown. It would, no doubt, have been better if the Recorder had discussed the evidence to some extent, but, after having been directed on the law, the jury were fully aware of the issues which they had to decide and were in a position to deal with questions of fact. Although neither of the standard formulae with regard to burden of proof was used by the Recorder, the summing-up, read as a whole, indicated sufficiently to the jury the standard of proof required.

Ashworth J.: This appellant, Joseph Albert Attfield, was convicted on two counts of indecent assault on two boys, and two counts of gross indecency, at Portsmouth Quarter Sessions, and was sentenced by the learned Recorder to nine months' imprisonment. He appeals to this court by leave of the court.

The two substantial grounds of appeal on which he relies are as follows: First, he says that the learned Recorder failed to instruct the jury correctly on the burden of proof, and secondly, and perhaps with more force so far as the appellant is concerned, he says that the summing-up was wholly defective and amounted to a misdirection in that throughout its course the learned Recorder omitted to discuss any of the evidence except that as to the appellant's character.

It is desirable to state shortly the calendar in regard to the trial itself. The case was called on late in the afternoon of Wednesday, March 29, 1961. On March 30, after a late start, witnesses were called, including the present appellant. Time went on till about six o'clock or thereabouts, and the learned Recorder then invited counsel for the prosecution to summarise for him the points on which he relied in regard to corroboration and, having heard argument on that, the learned Recorder then delivered to the jury what is accepted before us as an invitation to them to stop the case and acquit the appellant. It is quite unnecessary to read that invitation, which was lengthy, but it is plain from a study of it that the learned Recorder was suggesting to the jury that having regard to the discrepancy in the boys' evidence, the appellant's good character and the like, it would be unsafe for them to convict, but the jury withdrew and after a six minutes' retirement they returned and the foreman said this: "We all feel that we cannot return a verdict now. We must hear the case to the end." That was the Thursday before Easter, and the court rose at seven o'clock in the evening. On Easter Tuesday the trial was resumed. Two witnesses were called on behalf of the appellant, and then counsel, first for the defence, and then for the Crown, addressed the jury, and the learned Recorder came to sum up to the jury, as he says in his opening sentence, at 3.20 in the afternoon. The summing-up took him twenty-five minutes.

It is unnecessary, except in the briefest summary, to mention the facts of the case. The period over which the offences were said to have been committed was considerable. The boys, if the prosecution were right, were assaulted by the appellant, so to speak, in succession, and one of the points made on behalf of the defence was that this was a fabricated story by the second boy, and a case of revenge by the first. The details as to the indecencies were unpleasant and precise. The appellant himself gave evidence, and protested more than once in answers in cross-examination that he was in love with the boys. Without citing his evidence in any detail, it is sufficient for this court to say that any jury hearing those answers might well take the view that they were the answers of a most unpleasant man.

It is convenient to deal first with the point that the summing-up was defective on the ground that the evidence was not dealt with at all except in regard to the appellant's character. No doubt, it is right to say that probably in nine cases out of ten that come before the courts, the trial judge, whether he be a judge or recorder or Chairman of Quarter Sessions, in summing-up goes through the evidence. It would be quite wrong to suggest that it is the trial judge's duty to

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read out the whole of the evidence, and that is not suggested. Indeed, many would take the view that a mere recitation of evidence which the jury themselves have heard does not assist them at all. In most cases what the trial judge endeavours to do is by reference to the evidence to direct the jury's attention to what may be called the salient features for and against the accused man. No case has laid down, so far as we are aware, that it is essential for the validity of a summing-up that there should be a reference to the evidence, but equally there is no case that, so to speak, absolves a court from what is normally its function of assisting the jury by dealing with the evidence. Some assistance is to be gained from a passage cited in STODDART (1909) 2 Cr.App.R. 217. In that case a trial had taken place over a period of twenty days, and there was an omission to direct the jury upon many of the no doubt complex issues which had been considered in the course of it, but this court at p. 246 cited Lord Esher's words in ABRATH *v.* NORTH EASTERN RY. (1883) 11 Q.B.D. 440, at p. 452, as follows: "It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood." That is the end of the quotation, and this court then went on: "Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice."

Nothing that this court is saying today is intended to put forward the suggestion that a judge is entitled to refrain from discussing the evidence if the circumstances of the case and the conduct of the trial demand that he should. The words that are important in STODDART's case (*supra*) are that each case must depend on its own facts. Clearly, in a complicated and lengthy case it is incumbent on the court to deal with the evidence. Conversely, in a case which has not occupied a great deal of time and in which the issue, guilt or innocence, can be simply and clearly stated, this court is not prepared to hold that it is a fatal defect to the summing-up that the evidence has not been discussed.

In the present case, if one reflects upon what had transpired before the jury, while it is true that the jury had seen the witnesses five days before they gave their verdict, nonetheless the impression created by those witnesses, the boys against the man, the police officers against the man, must, one may well think, have created an impression upon the jury and, accordingly, on the Tuesday after Easter, having heard the addresses of counsel pointing out the pros and cons, and then listened to a direction on the law, we think that they were in a position adequately to discharge their duty of deciding which side they were to believe. It is true, as Mr. Tucker has said, that there were points which could be made on behalf of the present appellant. No doubt they were made by him in addressing the jury, but it is equally true to say that there were points which no doubt were cogently made by the prosecution against him, and what the learned Recorder did was to carry out what appears to have been his intention on the previous Thursday to leave the jury to decide, as was their duty, the issue of fact for themselves. Accordingly, this court would not be prepared to set aside this conviction on that ground.

The other ground depends on the wording of the summing-up in regard to the burden of proof. It is fair to say that

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over and over again appeals are brought to this court, or applications are made for leave to appeal based on alleged inadvertencies in direction as to the burden of proof, and this court finds itself in the position of having to apply, so to speak, two parallel principles. In the first place, the direction as to the burden of proof and as to the standard of proof is undoubtedly of cardinal importance. That is a point in favour of the appellant, and if the direction fails in that respect, then indeed the appeal is all the more cogent. On the other hand, there is a counterbalancing principle that this court has said that the words of a summing-up are not to be weighed in too nice scales provided that the substance of the summing-up presents to the jury the issue in a form in accordance with law. It is in the application of those two counterbalancing principles that this court fulfils its function.

In the present case the complaint is made that nowhere from first to last in this summing-up was there any reference either to reasonable doubt or to the current word " sure." So far as the wording itself is concerned, that is true. Throughout the summing-up over and over again the learned Recorder used the word " satisfied," but it would not be fair to the learned Recorder to leave the matter as if that was all that he had said. In more than one place he had directed the jury to considerations which would have been perfectly appropriate if they had been coupled with the words " reasonable doubt." In effect, he was indicating to them that if they had such a doubt, if in their judgment as men of good sense they were not satisfied, then they should not convict. In one place the learned Recorder said this: " You will pay such attention to the arguments that they have advanced to you: On the one hand whether prosecuting counsel has proved the defendant's guilt by evidence which he has called or which has been called before you and, on the other hand, whether counsel for the defence has indicated that the evidence leaves you in such a doubt that it would be unsafe for you to convict." Then, after referring to the accused's good character, he said this: " If, looking at his good character, you think he is a witness of

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truth, then of course, that would have proved his innocence because you accept his evidence and obviously he is entitled to a verdict of not guilty. Members of the jury, if because he is a man of good character, having heard his evidence, having observed him in the witness box, you think that it is extremely unlikely that a man of his reputation would commit these offences, then that is another reason why you should be doubtful about the proof of his guilt."

This court would wish to reiterate what has been laid down now in several cases, that the proper form of direction is that the jury should be directed that the burden of proof is on the prosecution, and that the standard of proof required before a verdict of guilty can be returned is that the jury should be satisfied, that they should feel sure. If that simple formula is used, no criticism can be made. In the absence of the use of that formula, in this case when one considers the summing-up as a whole, it is not, in our view, such a defect as would justify this court in interfering with the conviction.

Before parting with the case, it might be desirable to mention again that, while dismissing this appeal, this court does not approve of the course that was taken in this case. It would have been very much better if the learned Recorder on the Tuesday afternoon had summarised the evidence by directing the jury's attention to the salient points. Equally, it would have been much better if he had coupled the words "satisfaction" with the word "sure." None the less, in spite of those points of criticism, which have been most ably put forward by Mr. Tucker, this appeal must be dismissed.

Appeal dismissed.

Solicitors: J. R. Haselgrave, Portsmouth, for the Crown.

[IN THE HOUSE OF LORDS]

BEFORE

LORD REID, LORD GODDARD, LORD TUCKER,
LORD DENNING AND LORD MORRIS OF BORTH-Y-GEST

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Appeal to House of Lords—Points Open to Appellant—Matters Consequential to Question Certified—Matters Wholly Unrelated to Question—Administration of Justice Act, 1960 (8 *&* 9 *Eliz.* 2, *c.* 65), *s.* 1 (2).

Psychopath—Drunkenness—Explosive Outburst in Course of Mental Disease—Disease not Caused by Intoxicating Liquor.

By section 1 (2) of the Administration of Justice Act, 1960: "No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House."

The above subsection does not limit the House of Lords to consideration of the question certified and matters consequential on its decision of that question. If, in order to enable the House to dispose of the appeal, it becomes necessary to consider other matters, they have power to do so. The question how far it is open to an appellant to raise matters wholly unrelated to question certified appears still in doubt.

Per Lord Tucker: It will always be a matter for the exercise of the discretion of the House whether to allow a point in no way connected with the certified point of law to be argued on the appeal.

Per Lord Denning: Once leave to appeal to the House of Lords is given, all points are open to an appellant as well as the point certified.

If a man, while sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to murder, nor even as reducing it to manslaughter.

A psychopath who goes out intending to kill and voluntarily indulges in intoxicating liquor, which has the effect of bringing about an explosive outburst in the course of which he kills a person, cannot rely on his self-induced defect of reason as amounting to a defence of insanity.

The law relating to a defect of reason arising from drunkenness may be stated under the following heads. (i) Drunkenness may impair a man's power of perception so that he may not be able to foresee or realise the consequences of his actions as he would if he were sober. Nevertheless, he is not entitled to set up his self-induced want of perception as a defence. Even if he did not appreciate that what he was doing was dangerous, nevertheless if a reasonable man in his place, who was not befuddled by drink, would have appreciated it, he is guilty.

MEADE (1909) 2 Cr.App.R. 54; [1909] 1 K.B. 895, as explained in D.P.P. *v.* BEARD (1920) 14 Cr.App.R. 159, at pp. 194–196; [1920] A.C. 479, at pp. 502–504 followed.

(ii) It may impair a man's power to judge between right and wrong, so that he may do a thing when drunk which he would not dream of doing when sober. Though he does not realise that he is doing wrong, nevertheless he is not allowed to set up his self-induced want of moral sense as a defence. It is not a defence for a drunken man to say that he did not know he was doing wrong.

D.P.P. *v.* BEARD (1920) 14 Cr.App.R. 159, at p. 198; [1920] A.C. 479, at p. 506 followed.

(iii) It may impair a man's power of self-control so that he may more readily give way to provocation than if he were sober. Nevertheless, he is not entitled to set up his self-induced want of control as a defence.

MCCARTHY (1954) 38 Cr.App.R. 74; [1954] 2 Q.B. 105 followed.

These general principles are subject to two exceptions:

(a) If a man is charged with an offence in which a specific intention is essential, evidence of drunkenness which renders him incapable of forming that intention is an answer. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing.

MOORE (1852) 3 C. & K. 319 and D.P.P. *v.* BEARD (1920) 14 Cr.App.R. 159, at pp. 194–196; [1920] A.C. 479, at pp. 501–504, followed.

(b) If a man by drinking brings on a distinct disease of the mind such as *delirium tremens*, so that he is temporarily insane within the M'Naghten Rules, then he has a defence on the ground of insanity.

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DAVIS (1881) 14 Cox 583 and D.P.P. *v.* BEARD (1920) 14 Cr.App.R. 159, at pp. 193–194; [1920] A.C. 479, at pp. 500–501 followed.

Appeal by the Crown from an order of the Court of Criminal Appeal of Northern Ireland quashing conviction of murder.

The respondent, Patrick Gallagher, was convicted at Belfast Assizes before the Lord Chief Justice (Lord McDermott) and a jury on February 4, 1961, of the murder of his wife. He appealed to the Court of Criminal Appeal for Northern Ireland on the ground of misdirection, and the Court of Criminal Appeal on April 5, 1961, allowed the appeal and quashed the conviction. The Crown obtained from the House of Lords leave to appeal to the House of Lords, the Court of Criminal Appeal having certified that the following point of law of general public importance was involved in their decision: "Whether a person in a psychopathic condition which is quiescent may become insane (within the Rules in M'NAGHTEN'S CASE (1843) 10 Cl. & F. 200) as the result of the voluntary consumption by him of intoxicating liquor, if the effect of the intoxicating liquor is to bring about an explosive outburst in the course of a mental disease, although the disease was not itself caused by intoxicating liquor."

The respondent had frequently used violence towards his wife, generally after taking drink. There was evidence that he was an aggressive psychopath. For some time before September 7, 1960, he had been in a mental hospital. On that date he was allowed to go to Omagh. There he bought a knife and a bottle of whisky, the greater part of which he drank. He was seen cycling towards his home and two hours later he entered a neighbour's house under the influence of alcohol and said that he had killed his wife. She was found dead, having sustained extensive injuries from the knife and a hammer.

The House heard the appeal on June 19, 20, 21, 1961.

The Att.-Gen. for Northern Ireland (*W. Brian Maginess*, Q.C.) and *C. A. Nicholson*, Q.C. and *H. Bowman* (of the Bar of Northern Ireland), for the Crown.

B. Kelly, Q.C. and *R. Ferguson* (both of the Bar of Northern Ireland), for the respondent.

The House took time for consideration.

Lord Reid,
Lord Goddard,
Lord Tucker,
Lord Denning,
Lord Morris of Borth-y-Gest

July 20, 1961. The following opinions were read:

LORD REID: My Lords, the respondent Patrick Gallagher was convicted at Belfast of the murder of his wife on September 7, 1960. There is no doubt that he killed her. The defence was insanity or, alternatively, that he was so drunk when he killed her as to be incapable of having any intent to kill her or do her grievous bodily harm. So there was no room for a verdict of not guilty: if the defence had been successful, the verdict would have been guilty but insane or manslaughter.

The respondent appealed to the Court of Criminal Appeal for Northern Ireland on the ground of misdirection of the jury by the trial judge, Lord MacDermott, L.C.J. That court held that there had been misdirection and that the verdict of murder could not stand: they further held that in the circumstances they could not substitute either a verdict of guilty but insane or a verdict of manslaughter. They therefore directed a verdict of acquittal to be entered. The Attorney-General for Northern Ireland thereupon applied under the provisions of the Administration of Justice Act, 1960, for a certificate that a point of law of general public importance was involved and for leave to appeal to this House. The court granted a certificate, but refused leave to appeal. Leave to appeal was later given by this House.

Before coming to the certificate I must set out the facts so far as they are necessary for its consideration. The respondent had frequently used violence towards his wife, generally after taking drink. The medical evidence about his mental condition was conflicting, but there was evidence that he is an aggressive psychopath, that this is a disease of the mind which is quiescent for considerable periods but manifests itself from time to time in explosive outbursts, and that taking drink is likely to cause an outburst. For some time before

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September 7, 1960, the respondent had been in a mental hospital. On that date he was allowed to go to Omagh. There he bought a knife and a bottle of whisky. He was seen cycling towards his home and two hours later he entered a neighbour's house under the influence of alcohol and said he had killed his wife. She was found dead, having sustained extensive and brutal injuries from the knife and a hammer. The respondent had drunk the greater part of the bottle of whisky either before or after the killing or both.

I can now come to the certificate. The court certified that "the following point of law of general public importance was involved in the said decision: Whether a person in a psychopathic condition which is quiescent may become insane (within the meaning of the rules in M'NAGHTEN'S CASE (1843) 10 Cl. & F. 200) as the result of voluntary consumption by him of intoxicating liquor, if the effect of that intoxicating liquor is to bring about an explosive outburst in the course of a mental disease, although the disease was not itself caused by intoxicating liquor." One of the appellant's arguments submitted to the Court of Criminal Appeal and to this House was that, even if at the moment of killing his wife the respondent was incapable of knowing the nature and quality of his act or knowing that he was doing wrong, and even if that was a consequence or manifestation of his mental disease—of his being a psychopath liable to explosive outbursts—yet the defence of insanity was not open to him because before taking the drink—when there was no defect in his reason—he had clearly evinced an intention to kill his wife and any temporary derangement of his reason at the time of the killing was the result of his own voluntary act in taking the drink.

In my opinion, this is the point and the only point of law raised by the certificate. It is, I think, assumed in the certificate that during an "explosive outburst" the person's reason is dethroned to the extent required by the M'Naghten Rules. Whether that assumption was justifiable on the evidence may be questionable, but the argument before the Court of Criminal Appeal appears to have proceeded on the footing that there was sufficient evidence to entitle a jury to come to that conclusion, if so minded.

The first argument submitted by counsel for the respondent was that under the provisions of the 1960 Act this House had no power or jurisdiction to decide any question beyond that set out in the certificate. If a decision of that question is sufficient to dispose of the whole case, then this House can do that, but not otherwise. Counsel then submitted that no matter how the question of law in the certificate is dealt with, that cannot lead to substituting another verdict for the verdict of acquittal entered by the Court of Criminal Appeal. This must, I think, have been the view of that court because the ground on which they refused to grant leave to appeal to this House was " that in the opinion of this court a ruling on this point of law in favour of the Crown's contention would not lead to a reversal of the decision of this court."

That argument depends on the proper construction of section 1 of the Administration of Justice Act, 1960, which is in the following terms: " 1.—(1) Subject to the provisions of this section, an appeal shall lie to the House of Lords, at the instance of the defendant or the prosecutor—(*a*) from any decision of a Divisional Court of the Queen's Bench Division in a criminal cause or matter; (*b*) from any decision of the Court of Criminal Appeal on an appeal to that court. (2) No appeal shall lie under this section except with the leave of the court below or of the House of Lords; and such leave shall not be granted unless it is certified by the court below that a point of law of general public importance is involved in the decision and it appears to that court or to the House of Lords, as the case may be, that the point is one which ought to be considered by that House. (3) Section 5 of the Appellate Jurisdiction Act, 1876 (which regulates the composition of the House of Lords for the hearing and determination of appeals) shall apply to the hearing and determination of an appeal or application for leave to appeal under this section as it applies to the hearing and determination of an appeal under that Act; and any order of that House which provides for the hearing of such applications by a committee constituted in accordance with the said section five may direct that the decision of that committee shall be taken on behalf of the House. (4) For the purpose of disposing of an appeal under this section the House of Lords may exercise any powers of the court below or may remit the case to that court. (5) In this Act, unless the context otherwise requires, 'leave to appeal' means leave to appeal to the House of Lords under this section."

Subsection (1) allows an "appeal" from a "decision" of the court below, and subsection (4) authorises this House in "disposing of" the appeal to "exercise any powers of the court below." So far there is nothing to suggest that the powers and duties of this House in this matter are different from or more limited than its powers and duties in ordinary appeals.

The difficulty arises from subsection (2), which limits the grounds on which leave to appeal can be granted. First, there must be a certificate by the court below that a point of law of general public importance is involved in the decision, *i.e.*, in the decision of the court below. And then comes the provision which causes the difficulty: before the court below or this House can grant leave it must appear that "the point is one which ought to be considered" by this House.

Taken by themselves, these last words might seem to indicate that all that this House is to do is to consider (which must include deciding) the point of law. But that cannot be right, because there would then be no reason for authorising this House to exercise "any powers of the court below." Moreover, a limited consultative jurisdiction of this kind would be a novelty in United Kingdom procedure and if that were all that this House can do, the procedure could hardly be called an "appeal" from the "decision" of the court below. The point of law is not the decision—it is only "involved in the decision." The decision in the present case was the substitution of a verdict of acquittal for the verdict of murder and that is the decision from which the present appeal lies. The point certified by the Court of Criminal Appeal is certified by them as having been " involved in the decision."

To make the issue clearer let me suppose a case where the respondent in this House argued two points in the court below either of which, if right, entitled him to succeed. The court below, having decided one in his favour, might well say it was unnecessary to consider the second. Then, the first point having been certified, this House holds that the court below was wrong. What is then to happen? It cannot reasonably be supposed that Parliament intended that the respondent is to have no opportunity of having his second point considered so that his conviction must stand. So it must either be considered by this House or by the court below. It is true that subsection (4) authorises a remit to that court, but that is only for the purpose of disposing of the appeal to this House. I can find nothing to authorise a remit to the court below directing it to reopen and rehear the case and come to a fresh decision. So in that case at least this House must go beyond the point certified and hear and decide the second point which may have no connection at all with the first.

If in such a case this House must exercise the whole of its ordinary functions on appeal, what is there to show that in some other class of case it is not to do so? The respondent points to the contrast between the language of section 1 (2) of the 1960 Act and the language of section 6 (1) of the Criminal Appeal (Northern Ireland) Act, 1930 (which is the same as in the corresponding English Act). Under the latter the Attorney-General had to certify that " it is desirable in the public interest that a further appeal should be brought ": under the 1960 Act it must appear " that the point is one which ought to be considered by that House ": under the old procedure it was decided in MILNE *v.* CITY OF LONDON POLICE COMMISSIONER (1940) 27 Cr.App.R. 90; [1940] A.C. 1, that it was open to the appellant to take any point before this House and the argument is that the change of language in the 1960 Act clearly shows an intention to alter this.

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In my judgment, the change of language can properly be regarded as indicating an intention to make some alteration, but the question remains—What was the alteration which was intended? In deciding that well-settled principles require us to go to the words of the new Act, we can have in mind the circumstances when the Act was passed and the mischief which then existed so far as these are common knowledge, but we can only use these matters as an aid to the construction of the words which Parliament has used. We cannot encroach on its legislative function by reading in some limitation which we may think was probably intended, but which cannot be inferred from the words of the Act.

If I had to consider the provisions of subsection (2) without reference to the earlier law, I would have no doubt that the purpose of subsection (2) is merely to define the conditions which must be satisfied before leave can be given and that once leave has been given its purpose is spent. The court below must certify that a point of law of general public importance is involved: then leave is not to be granted unless further it "appears," or is thought by that court or this House in deciding whether to give leave, that that point is one which ought to be considered by this House. I would not infer a prohibition against this House considering anything else but that point, and I would find no basis for an inference that this House is permitted to consider some further points, but not others which it could normally consider in an ordinary appeal.

It is familiar and well known that one thing which this House considers in deciding whether to give leave in a civil case is whether the case involves a point of law which ought to be considered by this House. But once leave is given this House can and does consider other points as well. Subsection (2) could well mean that, whereas in civil cases the existence of such a point is only one element, though an important element, in deciding whether to give leave, in criminal cases it is an indispensable element. There was no such indispensable element under the former law: so far as its language went,

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the Attorney-General could have acted on any ground that seemed sufficient to him to warrant a certificate that it was desirable in the public interest that a further appeal should be brought. Of course I do not say that this was the reason for the change of language. I only say that it is not an inevitable inference from the change of language that it must have been intended to limit the scope of the appeal once leave had been given.

As the proper construction of this section raises a new and important issue, I do not wish to go further than is necessary to decide this case. Others regarding it in light of different facts may be more successful than I have been in finding in the terms of the section some basis for an implication that in hearing an appeal under it the powers of this House are in some way limited. This is a case in which the question of law certified and the question whether there was misdirection are not entirely unrelated. They are different questions because, even if I agree with the view of the Court of Criminal Appeal on the question of law certified—and I do agree with what I understand to be their view—I can still hold that there was no misdirection. So a decision that there was no misdirection is in no way merely consequential on a decision on the point of law certified. It is therefore necessary for me to hold, as I do, that the section does not limit this House to the question certified and matters consequential on its decision of that question. But I do not have to decide whether it is open to an appellant to raise matters wholly unrelated to the question certified.

On the question of misdirection, I have had an opportunity of reading the speech about to be delivered by my noble and learned friend Lord Tucker. I agree with it, and in particular I wish to add that I entirely agree with his view that absurd and disastrous consequences can result from the present limitation of the powers of the Courts of Criminal Appeal. Accordingly, I move your Lordships that this appeal should be allowed and the verdict of murder restored.

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LORD GODDARD: My Lords, in my opinion this appeal should be allowed and the verdict and sentence passed at the trial restored. I have had an opportunity of reading the opinion about to be delivered by my noble and learned friend Lord Tucker, who has fully and carefully analysed the medical evidence, and I agree with his conclusions. I would, however, say that, despite the somewhat guarded admission of the Attorney-General before the Court of Criminal Appeal, there was not, in my opinion, any evidence of insanity: at the most, evidence only of self-imposed drunkenness. I will assume the respondent was an aggressive psychopath, but no one suggested that such a condition of itself amounted to insanity. I will assume that on one who suffers from that mental condition alcohol can have an explosive effect. This means no more than that drink would, or at most might, result in a loss of self-control. But to admit that as a defence would be to allow self-imposed intoxication to be set up as a defence of insanity, a proposition which was emphatically negatived by this House in D.P.P. *v.* BEARD (1920) 14 Cr.App.R. 159; [1920] A.C. 479. Moreover, there was no evidence whether the accused consumed the whisky before or after he attacked his wife. No one suggested that at the time of his trial he was insane; he gave a reasonably coherent account of what he had done and why he did it directly or very soon after the killing, but he gave no evidence at his trial and has never suggested that he did not know what he was doing when he killed his wife. In my opinion, there was no misdirection by the Lord Chief Justice; it was most important to consider what the mental state of this man was when he set out in the morning to visit his wife, and equally important to consider his condition after he had killed her. When a defence of insanity is raised, there is seldom evidence of witnesses who saw the killing; it has to be inferred in so many cases from the history of the accused before and after the actual deed. The defence could only rely on the evidence of Dr. Dawson, who to his credit was careful to emphasise that he could not be positive.

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In my opinion, his evidence does not support the onus which was on the accused to establish insanity.

The other matter which was argued on the appeal, whether this House is confined merely to answering the question submitted as one of general public importance has, I admit, caused me some difficulty. Reading subsection (2) of section 1 alone would seem to support the view that the House is confined to a consideration of the point certified by the court below. But subsection (2) requires the House to dispose of the appeal and enables it to exercise any powers of the court below. It may well be in many cases that the answer to the specific question will dispose of the appeal, as in the case of the appeal recently before the House [1] where the question submitted was whether there is still such an offence as misprision of felony. An answer in the affirmative upheld the decision of the trial court and no further question arose or could arise. But for the reasons given by my noble and learned friend Lord Reid it is clear that this may not be always the case, yet the House must dispose not merely of the question certified but of the appeal and, if to enable this to be done, it becomes necessary to consider other matters, in my opinion they must have power to do so.

I would add that this case affords a striking illustration of what may result from the Court of Criminal Appeal in Northern Ireland, as in England, having no power to order a new trial in an appropriate case. Had it not been possible for the court to certify that a point of law of general importance arose in the case and for this House to hold it was fit for their consideration, a man who had brutally murdered his wife and whom the jury had declined to find was insane would have had to be set at liberty free of any consequence of his crime.

LORD TUCKER: My Lords, I agree that once the court from which the appeal is brought has certified that a point of law of general public importance is involved in the decision, and leave to appeal has been given, either by that court, or this

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[1] SYKES *v.* D.P.P., *ante*, p. 230; [1961] 3 W.L.R. 371.

House, the jurisdiction of this House to hear the appeal is established, and there is nothing in the Administration of Justice Act, 1960, in any way limiting its jurisdiction. It will always be a matter for the exercise of its discretion whether to allow a point in no way connected with the certified point of law to be argued on the appeal, and it is not to be assumed from the decision in this case that an appellant can as a matter of right raise any such point. In the present case I consider the point certified of necessity requires an examination of the decision of the Court of Criminal Appeal, and when this decision is looked at it becomes clear that in order to dispose of the appeal the direction of the Lord Chief Justice to the jury on the law with regard to the defence of insanity, as applied to the evidence given at the trial, must be considered.

The appeal is brought by the Attorney-General for Northern Ireland under the provisions of sections 1 and 2 of the Administration of Justice Act, 1960, against the order of the Court of Criminal Appeal in Northern Ireland dated April 5, 1961, whereby it was ordered that the respondent's appeal from his conviction for murder be allowed and judgment and verdict of acquittal be entered on the indictment whereon he was convicted.

That the respondent killed his wife is beyond all question and in the Court of Criminal Appeal and in this House it was common ground that in the only possible verdicts were (1) guilty of murder; (2) guilty of manslaughter; (3) guilty but insane. A verdict of acquittal, *i.e.*, not guilty, is the one verdict which no reasonable jury could have returned, yet this is the verdict which the Court of Criminal Appeal has directed to be entered on the indictment. This involves no criticism of the Court of Criminal Appeal, but serves to expose the absurd and disastrous consequences which may result from the restrictions which Parliament has imposed upon the powers of the Courts of Criminal Appeal in Northern Ireland and in England. The language of the relevant statutes is identical and does not in any case permit an order for a new trial nor, in a case such as the present, give the court any discretionary powers with regard to verdict or sentence.

At the trial before the Lord Chief Justice of Northern Ireland and a jury at the winter assizes in Belfast from January 30 to February 4, 1961, the respondent was indicted for the murder of his wife, Rose Gallagher, on September 7, 1960. He pleaded not guilty, and, though, of course, no admission was or could be made, there was no attempt to challenge the evidence of the prosecution to the effect that the respondent killed his wife. The defence relied upon was that he was insane at the time within the meaning of the M'Naghten Rules or in the alternative was by reason of drink incapable of forming the intent necessary to constitute murder and therefore guilty only of manslaughter.

The defence of diminished responsibility is not available in Northern Ireland. The following is an outline of the facts proved by the uncontradicted evidence of witnesses or from admissions made by the respondent in statements to police or other persons.

The respondent and his wife had been married for about sixteen years, during which time there were frequent quarrels, generally when he had taken drink, and on occasions he used violence towards her. In 1957 she obtained a separation order against him and he went to England. He was injured at work there and in 1959 returned to Ireland and lived again with his wife and family near Omagh. His drinking habits increased and there were further quarrels. On May 26, 1960, there was a serious quarrel. A doctor was sent for, who persuaded him to go for treatment to a mental hospital in Omagh, where he was admitted as a temporary patient. On June 8, he was allowed to go home on a ninety-day trial. He again started drinking and assaulted his wife. On July 19, she refused to let him in and he went to his father's house. The doctor (Lagan) visited him there and arranged for his readmission to the mental hospital. By mid-August his condition had improved and he was allowed to go into Omagh. On the 15th of that month his wife obtained an order for maintenance against him for £3 a week. On September 6, he was seen by Dr. Gray at the hospital, when he appeared to be cheerful and perfectly normal. On September 7, Mrs. Gallagher was alone in the house after the children left for school. At 9.45 the respondent left the hospital and went into Omagh where he bought a " Sky-line " knife. He then entered a public house where he bought a bottle of " Guinness " and a bottle of Power's whisky. Shortly after this he was seen riding a cycle along a road which was one of the routes leading to his wife's house to reach which would take him about half an hour. At 1.30 p.m. Miss Aitken and Mrs. Speers, who lived next door to Mrs. Gallagher, heard a noise and saw the respondent collapsing on the kitchen floor. He had blood on his clothes and hands and was drunk. They threw water on him. When he had recovered they asked him what had happened to him. He said he had killed his wife. One of them said " Oh, no, you didn't," and he replied: " Come round and see." They went to the house and found Mrs. Gallagher's body in the bed covered with bedclothes up to her neck, and blood on the floor. They took the respondent back to their house, locked the door of Mrs. Gallagher's house and sent for the police.

When the police arrived they found Mrs. Gallagher's body naked except for a pair of shoes. There were terrible injuries to her head and body. The head and face were covered in blood and the sheets saturated. A " Sky-line " knife with a seven-inch blade stained with blood to the hilt was found in the room. On the floor beneath the bed was an old hammer, the head of which was stained with blood. On the chest of drawers was a bottle of Power's whisky containing the equivalent of about two glasses. There were blood stains on the cellophane with which the bottle was wrapped. At about 4.15 p.m. the respondent said to Sergeant Coyle at Omagh Police Station: " I have no regrets: she gave me a hell of a life these past three years." Later, after caution, he said: " I made up my mind to kill her about a fortnight or three weeks ago." Shortly after 7 p.m. he said: " I am going to open up my mind to you." He was told: "You don't have to" and again cautioned. He said: "I will tell you all. I left hospital this morning about half past nine on parole given to me by Dr. Johnston. I went into Wellworth's and bought a knife at five and three and a bottle of aspirins. After I had killed my wife I was going to do myself in by first taking the aspirins to deaden the pain and then use the knife on myself. I went into Yarrow's pub in Bridge Street and drank a bottle of 'Guinness' and bought a bottle of whisky for £2. I went out on the bicycle and hid it. You fellows will have bother getting it. I went into the house at almost half past eleven and the wife was on her own. I asked her to take me back but she wouldn't. I then drank half of the whisky." The medical evidence showed that sexual intercourse had taken place, which could have occurred at any time from a day or two before death until after death.

My Lords, I have found it necessary to set out this evidence in some detail as it will be observed that nowhere does the respondent suggest that at any time he did not know the nature and quality of the act which he did or that he did not know it was wrong. Nor does he ever say he was drunk when he did it or show any regret for that which he had done. He gave no evidence at his trial. Nonetheless the defence was that he was "labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing was wrong." It was sought to establish this defence by expert medical evidence directed to prove that the respondent is what is called "a psychopath" the characteristics of which are "emotional immaturity and instability; they live in themselves and lack social sense; they tend to yield to their instincts readily and lack self-control." There are different types of psychopaths and the respondent is said to be of the aggressive type, *i.e.*, one who with provocation or on taking alcohol is apt to have a severe aggressive reaction or emotional outburst which may result in loss of control.

Some of the medical witnesses for the prosecution had found no signs of psychopathy in the respondent, but they were all prepared to agree either that he was probably a psychopath or that he might possibly be one. One witness thought he was probably an "inadequate psychopath" rather than an "aggressive psychopath," but the vital difference between the expert medical witnesses for the prosecution and Dr. Dawson for the defence was whether a man suffering from this type of disease of the mind, when he has one of these emotional outbursts, does or does not know the nature and quality of his acts or, assuming such acts to be criminal, that they are wrong. The prosecution's evidence was that this type of disease of the mind merely produces lack of self-control and does not impair a man's appreciation of the nature of his acts or knowledge that they are wrong. Dr. Dawson for the defence was not prepared to say positively that such a disease does produce this result, but expressed a doubt whether a man suffering from this disease would, in one of these outbursts, know the nature of his acts or that they were wrong. Assuming for the moment that such a doubt, if accepted by the jury in preference to the positive assertions to the contrary by the prosecution witnesses, would suffice to establish the defence, the fact remains that if the jury rejected the defence evidence as to the nature of the mental disease and accepted the evidence for the prosecution that the respondent was never suffering from a disease of the mind which would produce anything more than lack of control, the defence would fail *in limine*. The defence have not shown that the disease of the mind proved is of the kind which will produce the required results from their point of view. It was, I think, with this in mind that the Lord Chief Justice, having regard to the nature of the evidence, focused the attention of the jury on the respondent's mental condition at 9.30 a.m. when he left the hospital. Assuming he was then an aggressive psychopath likely to have an explosive outburst under certain circumstances, would such outburst produce nothing more than lack of self-control? If so, he would for present purposes be regarded as a normal being responsible in law for his actions who could not improve his case by the consumption of alcohol, unless such alcohol brought about some quite different type of disease such as delirium tremens, of which there was no evidence in the present case.

It may be convenient, before turning to the summing-up which the Court of Criminal Appeal have held to contain misdirections, to refer quite shortly to a few passages in the evidence of the medical witnesses, which summarise the effect of their evidence. The evidence of these witnesses was dealt with by the Lord Chief Justice in his summing-up in detail and it is not suggested that he did not place before the jury a clear and accurate assessment of its effect.

The evidence of Dr. Lagan, who is not a mental expert, was summarised by the Lord Chief Justice as follows: "Now his evidence would seem to me to amount, in general words, to this: That this man is a man who has been subject to violence for no apparent reason; he's liable to something that might be called a brainstorm; and Dr. Lagan added that he thought that he would have little knowledge of what he was doing at the time. He added that he was always sorry afterwards; and it's quite obvious from the doctor's evidence as to the position on earlier occasions . . . that he regarded him as mental—at least in some degree—not just a drunkard, but a man 'mental' in some degree."

Dr. Gray had had long experience in mental institutions. He first saw the respondent on May 26, 1960. He found him mildly depressed, quite rational and rather emotional. He subsequently saw him quite often and found no signs of mental abnormality. In cross-examination he said: "He possibly is a man of an aggressive psychopathic personality." He added: "In my opinion, leaving out of account any question of alcohol, the accused would have known what he was doing when he struck these blows. If he knew what he was doing, he would have known that it was wrong." He added that he had never seen him in a violent state and couldn't say what his condition would be when committing violence.

Dr. Johnston was the Resident Medical Superintendent of the mental hospital in Omagh. He saw the respondent at irregular intervals in the course of his routine work. He had allowed him out on parole and at that time saw no evidence of mental defect. In cross-examination he agreed that he was "probably" or "possibly" a psychopath. His intellectual age would be about nine or ten, the maximum in this scale being fifteen. He said his experience of an aggressive pyschopath was that they are clear as to what happened during the outburst. He added that if a psychopath was under the influence of drink it would be more probable that his appreciation of what he was doing would be more limited. He concluded: "Knowing this man and having heard the circumstances of this case and assuming he did these things to his wife, my opinion is that he knew what he was doing; in my opinion he knew what he was doing was wrong." It may be convenient to refer at once to the passage in the summing-up which followed the Lord Chief Justice's reading of this last passage to the jury—which he had called the test questions. These questions and the doctor's answers were clearly directed to the state of the respondent's mind at the moment of killing.

The learned judge said: "Now, if you accept that, it's the end of this defence of insanity, because if you accept that, the man doesn't qualify, according to the rules which have been laid down. He may be a psychopath; he may be abnormal; he may be mentally defective—but if you accept that opinion of Dr. Johnston's he is not entitled to succeed in the defence of insanity which we are now discussing."

The effect of the evidence of Dr. Dawson upon which the defence of insanity rested is summarised in the following passages: "Q. On that date (*i.e.*, September 7, 1960) what is your opinion about the state of the accused's mind? A. . . . From the description of him when he was found, from the description of the terrible injuries received by his wife, it could be explained by a severe explosive reaction in

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an aggressive psychopath, probably to some extent, at least under the influence of drink. Q. What in your opinion was his mental state prior to and at the time of killing her? A. Well—this is presumption purely on what I've heard, and the nature of her injuries, and what I know of the man and of his state when he was discovered—therefore I cannot quite honestly go beyond probabilities—but I do feel it is probable that this alleged attack on his wife was carried out while in one of these explosive reactions. It would seem to me to fit what I have heard—I cannot go further than that." In the course of his answer to a further question as to the state of the respondent's mind during the explosive outburst he said: "Assuming I am right in considering that he might be subject to the short-circuit and bomb-like type of reaction; and assuming also, my Lord, that he may have been under the influence of alcohol, I can only express a very real doubt, either to his having an appreciation of what he was doing, or that even it was wrong—on those assumptions, my Lord, I have given this question, which I knew would be asked, very anxious thought." Asked to explain the difference between the presence and absence of alcohol he said: "Well, the only distinction I can draw, my Lord, is alcohol would make it still more doubtful as to whether he knew the nature and quality of his act; but even if he hadn't alcohol and was acting under provocation, with an extreme emotional reaction to that provocation, I would still have to express a doubt as to his appreciation of the nature and quality of his act—a doubt, my Lord." This is the passage which the Lord Chief Justice in his charge to the jury described as the high-water mark of his evidence. He said: "That is as far as he can put it, he says so very fairly. He can't be positive; he can't tell you that this man, in his opinion, didn't know what he was doing or didn't know that it was wrong. He says that for him there is a doubt. . . . Alcohol would make it still more doubtful."

These are the conflicting medical views. There is some difference of opinion as to whether the respondent is in fact an aggressive psychopath. Dr. Dawson says he was, some of the others are prepared to accept that he might be, but the real conflict was whether these explosive reactions or outbursts in the case of an aggressive psychopath merely diminish or destroy the power of self-control or whether they prevent him having any knowledge of the nature and quality of his act or that it is wrong. It was a conflict with regard to the nature of the disease of the mind from which the accused was suffering, assuming he had the disease. If the witnesses for the prosecution were right, this disease does not even under provocation or the stimulus of alcohol produce anything more than lack of self-control. If this was the true nature of the disease from which the respondent was suffering at 9.30 a.m. on September 7, 1960, and presumably still suffers today, the defence of insanity fails at the outset. It was accordingly, in my view, not only permissible but right and proper for the Lord Chief Justice to direct the jury to consider the condition of the man at that time and to tell them in effect that the subsequent consumption of alcohol could not assist the defence of insanity. This does not mean that a man can never produce in himself a disease of the mind by the excessive consumption of alcohol, *e.g.*, *delirium tremens*, and in such a case the question will arise whether the disease so produced results in insanity within the M'Naghten Rules. This was not such a case. It was not suggested that the respondent became an aggressive psychopath as a consequence of the consumption of alcohol. He was, it was said, an aggressive psychopath liable to outbursts of violence on provocation or under the influence of alcohol or any other exciting cause.

With these observations I turn to the judgment of the Court of Criminal Appeal. They said: "The main criticism on behalf of the appellant of the Lord Chief Justice's directions to the jury was that he directed them to apply the M'Naghten test not to the time when the appellant killed his wife, but to the morning of that day before he opened the bottle of whisky. It is pointed out that he so directed the jury both in the early part of his summing-up and also again nearer the end. This is at variance with the specific terms of the M'Naghten Rules which definitely fix the crucial time as the time of committing the act. The insanity sought to be relied on in the present case is a very special form of mental aberration. A jury would be entitled, if they accepted Dr. Dawson's evidence, to find that the appellant suffered from a disease of the mind which was episodic and that it could only affect the appellant's reason during one of the explosive outbursts to which Dr. Dawson referred. If their consideration was directed away from the actual time of the killing to some earlier period in the day when the disease was quiescent, they might easily come to the conclusion that the appellant was not then suffering from the type of affliction which was being relied upon by the defence. As against this it is pointed out that time and time again throughout the summing-up the Lord Chief Justice recurs to the questions 'Did the accused know what he was doing and did he know that what he was doing was wrong,' and that on every occasion he relates these questions to the time of the fatal acts. This would be a conclusive answer if we could be sure the jury in deciding the issue of insanity addressed themselves to these questions. No one can say what happened in the jury room. If the jury followed in their deliberations the order in which the M'Naghten test was placed before them in the summing-up, it is conceivable that they may first have chosen to consider whether the appellant was suffering from a mental disease—relating this question to the morning of the crime—and having considered that the answer to this question was in the negative may have concluded that the defence of insanity failed."

The passages referred to are as follows: " Now, the next question I want to take up with you is in some ways, perhaps, the most difficult aspect—at all events for me—of this unfortunate case: When do you apply that M'Naghten test in this case? We have heard a lot here during the course of this trial about intoxication, about brain storms, about explosions, about sudden reactions, and it's very important, as I understand the situation, that we should get a pretty clear notion not only what the test is, but when it's applied.

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"There is a question of the man's intoxication—which I will come to presently—and it raises an issue in itself; it also complicates the question of insanity. But, gentlemen, the whole tenor, the whole weight, of the evidence in this case, as I have found it, is to the effect that if this man was suffering from a disease of the mind, it wasn't of a kind that is produced by drink. Sometimes we get cases where a man has become so sodden with drink that his mind becomes diseased; but that's not this case. There is clear evidence here—and it hasn't been disputed—that such mental peculiarities as he had may have existed when he wasn't taking drink. There's the evidence of Dr. Johnston, as well as Dr. Gray, that his mind hadn't deteriorated. There's every reason to come to the conclusion that if this man was insane, it wasn't because of drink. I didn't understand that was challenged; and it seems to me that in view of that, and in view of all the circumstances of the case, you have to regard his condition on the 7th of last September, before he touched a drop—on this question of insanity—later we have to come to another state of affairs—but on this question of insanity, my direction to you is that, in point of law, you must come to your conclusion without reference to the drink that the accused took on the 7th of September; and that you should direct your attention to the state of his mind on that morning before he opened the bottle of whisky.

"This defence of insanity in this case cannot be made good with the aid of that bottle of whisky. If the accused was responsible for his actions before drinking that morning, he did not, in the eyes of the law, bring himself within the category of insanity which makes a man not responsible for his actions simply by making himself drunk. In other words, if a man is answerable for his acts, he can't bring himself over the line and be deemed not answerable by taking drink."

And towards the end of his charge: "Now, apply this test which I have described to you, I am afraid, on several occasions now, in the light of all that evidence, of your own good sense, of what the medical men, out of their experience and skill, have told you, of all the circumstances of the case, and apply

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it to the situation as it existed that morning before the man started on the whisky bottle. If you come to the conclusion that, on the balance of probabilities, this man didn't know that what he was doing was wrong, then you should find him guilty, but insane. On the other hand, if you come to the conclusion, remembering that the burden is on him of proving this defence of insanity, that he did know what he was doing when he killed his wife, then you should find him guilty on this defence. Remember the test, again. First of all, was he suffering from some disease or infirmity of mind? Is it such that he didn't know that what he was doing was wrong; or, if he did know, that he didn't know it was wrong—I'm sorry—I'll put that again. Is he suffering from a disease of the mind? As a result of that, was he prevented from knowing what he was doing: or, if he did know what he was doing, that it was wrong?"

My Lords, these passages, or parts of them, taken in isolation and quoted in a textbook on crime might be open to some criticism, but they must be considered in the context of a careful and detailed summing-up dealing with the medical evidence in relation to the particular kind of mental disease relied upon by the defence. What the jury were being told was that they should consider whether *the particular mental disease from which he was said to be then suffering* was of the nature described by Dr. Dawson, namely one in which violent outbursts will produce absence of knowledge of the nature and quality of the act or its wrongness, or merely lack of loss of self-control as stated by the prosecution doctors. Reading the summing-up as a whole this was, in my view, made abundantly clear. If, however, I am wrong in the interpretation I have placed on the summing-up taken as a whole, and if it is to be read in the sense impliedly attributed to it in the grounds upon which the Court of Criminal Appeal certified that their decision involved a point of law of general public importance, I would have no hesitation, in view of the overwhelming nature of the evidence, consisting largely of the respondent's own statements, in holding that there had been no miscarriage of justice, and

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that the proviso to section 3 (1) of the Criminal Appeal (Northern Ireland) Act, 1930, should be applied.

For these reasons I would allow the appeal and restore the verdict and sentence passed at the trial.

LORD DENNING: My Lords, every direction which a judge gives to a jury in point of law must be considered against the background of facts which have been proved or admitted in the case. In this case the accused man did not give evidence himself. And the facts proved against him were—He had a grievance against his wife. She had obtained a maintenance order against him and had been instrumental in getting him detained in a mental hospital. He had made up his mind to kill his wife. He bought a knife for the purpose and a bottle of whisky—either to give himself Dutch courage to do the deed or to drown his conscience after it. He did in fact carry out his intention. He killed his wife with the knife and drank much of the whisky before or after he killed her.

There were only two defences raised on his behalf: (1) Insanity; (2) Drunkenness. The Lord Chief Justice directed the jury that the *time* when they had to consider whether he was insane or not (within the M'Naghten Rules) was before he started on the bottle of whisky. "You should direct your attention," he said to them, "to the state of his mind before he opened the bottle of whisky." If he was sane at that time, he could not make good the defence of insanity "with the aid of that bottle of whisky." Immediately after the jury retired, Mr. Kelly took up this point of *time*. He suggested that it was inaccurate and inconsistent with the M'Naghten Rules. But the Lord Chief Justice adhered to his view. He declined to modify his charge to the jury on the matter. "If I'm wrong," he said, "I can be put right." It was on this very point of *time* that the court of Criminal Appeal reversed him. His direction was, they said, "inconsistent with the M'Naghten Rules," which fix the crucial time as "the time of the committing of the act," that is, the time of the killing and not at an earlier time.

The question is whether the direction of the Lord Chief Justice as to the *time* was correct. At least that is how I read the question posed by the Court of Criminal Appeal. It is complicated by the fact that, according to the medical evidence, the accused man was a psychopath. That does not mean that he was insane. But it sharpens the point of the question. He had a disease of the mind. It was quiescent before he started on the whisky. So he was sane then. But the drink may have brought on an explosive outburst in the course of which he killed her. Can he rely on this self-induced defect of reason and put it forward as a defence of insanity?

My Lords, this case differs from all others in the books in that the accused man, whilst sane and sober, before he took to the drink, had already made up his mind to kill his wife. This seems to me to be far worse—and far more deserving of condemnation—than the case of a man who, before getting drunk, has no intention to kill, but afterwards in his cups, whilst drunk, kills another by an act which he would not dream of doing when sober. Yet by the law of England in this latter case his drunkenness is no defence even though it has distorted his reason and his will-power. So why should it be a defence in the present case? And is it made any better by saying that the man is a psychopath?

The answer to the question is, I think, that the case falls to be decided by the general principle of English law that, subject to very limited exceptions, drunkenness is no defence to a criminal charge nor is a defect of reason produced by drunkenness. This principle was stated by Sir Matthew Hale in his *Pleas of the Crown*, Vol. I, p. 32, in words which I would repeat here: "This vice" (drunkenness) "doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy. . . . By the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."

This general principle can be illustrated by looking at the various ways in which drunkenness may produce a defect of reason:

(a) It may impair a man's powers of perception so that he may not be able to foresee or measure the consequences of his actions as he would if he were sober. Nevertheless he is not allowed to set up his self-induced want of perception as a defence. Even if he did not himself appreciate that what he was doing was dangerous, nevertheless if a reasonable man in his place, who was not befuddled with drink, would have appreciated it, he is guilty, see MEADE (1909) 2 Cr.App.R. 54; [1909] 1 K.B. 895, as explained in DIRECTOR OF PUBLIC PROSECUTIONS *v.* BEARD (1920) 14 Cr.App.R. 159; [1920] A.C. at pp. 502–504.

(b) It may impair a man's power to judge between right or wrong, so that he may do a thing when drunk which he would not dream of doing while sober. He does not realise he is doing wrong. Nevertheless he is not allowed to set up his self-induced want of moral sense as a defence. In BEARD'S CASE (1920) 14 Cr.App.R. at p. 198; [1920] A.C. at p. 506, Lord Birkenhead L.C. distinctly ruled that it was not a defence for a drunken man to say he did not know he was doing wrong.

(c) It may impair a man's power of self-control so that he may more readily give way to provocation than if he were sober. Nevertheless he is not allowed to set up his self-induced want of control as a defence. The acts of provocation are to be assessed, not according to their effect on him personally, but according to the effect they would have on a reasonable man in his place. The law on this point was previously in doubt (see the cases considered in BEARD'S CASE (1920) 14 Cr.App.R. at pp. 189, 190; [1920] A.C. at pp. 495–497) but it has since been resolved by MCCARTHY (1954) 38 Cr. App.R. 74; [1954] 2 Q.B. 105, BEDDER *v.* DIRECTOR OF PUBLIC PROSECUTIONS (1954) 38 Cr.App.R. 133; [1954] 1 W.L.R. 1119 and section 3 of the Homicide Act, 1957.

The general principle which I have enunciated is subject to two exceptions: (1) If a man is charge with an offence in which a specific intention is essential (as in murder, though not in manslaughter) then evidence of drunkenness, which renders him incapable of forming that intent, is an answer, see BEARD'S CASE (1920) 14 Cr.App.R. at pp. 194, 196; [1920] A.C. at pp. 501, 504. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing (see MOORE (1852) 3 C. & K. 319) as where, at a christening, a drunken nurse put the baby behind a large fire, taking it for a log of wood (*Gentleman's Magazine* 1748, p. 270): and where a drunken man thought his friend (lying in his bed) was a theatrical dummy placed there and stabbed him to death (*The Times*, January 13, 1951). In each of those cases it would not be murder. But it would be manslaughter.

(2) If a man by drinking brings on a distinct disease of the mind such as *delirium tremens*, so that he is temporarily insane within the M'Naghten Rules, that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity. See DAVIS (1881) 14 Cox 563, and BEARD'S CASE (1920) 14 Cr.App.R. at pp. 193–194; [1920] A.C. at pp. 500–501.

Does the present case come within the general principle or the exceptions to it? It certainly does not come within the first exception. This man was not incapable of forming an intent to kill. Quite the contrary. He knew full well what he was doing. He formed an intent to kill, he carried out his intention and he remembered afterwards what he had done. And the jury, properly directed on the point, have found as much, for they found him guilty of murder. Then does the case come within the second exception? It does not to my mind: for the simple reason that he was not suffering from a disease of the mind brought on by drink. He was suffering from a different disease altogether. As the Lord Chief Justice observed in summing-up: "If this man was suffering from a disease of the mind, it wasn't of a kind that is produced by drink."

So we have here a case of the first impression. The man is a psychopath. That is, he has a disease of the mind which is not produced by drink. But it is quiescent. And whilst it is quiescent, he forms an intention to kill his wife. He knows it is wrong, but still he means to kill her. Then he gets himself so drunk that he has an explosive outburst and kills his wife. At that moment he knows what he is doing, but he does not know it is wrong. So in that respect—in not knowing it is wrong—he has a defect of reason at the moment of killing. If that defect of reason is due to the drink, it is no defence in law. But if it is due to the disease of the mind, it gives rise to a defence of insanity. No one can say, however, whether it is due to the drink or to the disease. It may well be due to both in combination. What guidance does the law give in this difficulty? That is, as I see it, the question of general public importance which is involved in this case.

My Lords, I think the law on this point should take a clear stand. If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn him, coupled with the act which he intended to do and did do. A psychopath who goes out intending to kill, knowing it is wrong, and does kill, cannot escape the consequences by making himself drunk before doing it. That is, I believe, the direction which the Lord Chief Justice gave to the jury and which the Court of Criminal Appeal found to be wrong. I think it was right and for this reason I would allow the appeal.

I would agree, of course, that if before the killing he had discarded his intention to kill or reversed it—and then got drunk—it would be a different matter. But when he forms the intention to kill and without interruption proceeds to get drunk and carry out his intention, then his drunkenness is no defence and nonetheless so because it is dressed up as a defence of insanity. There was no evidence in this case of any interruption and there was no need for the Lord Chief Justice to mention it to the jury.

I need hardly say, of course, that I have here only considered the law of Northern Ireland. In England a psychopath such as this man might now be in a position to raise a defence of diminished responsibility under section 2 of the Homicide Act, 1957.

My Lords, I have thus dealt with the case by considering the point raised by the Court of Criminal Appeal: and by dealing with it, I think it is possible to dispose of the appeal. If it were necessary to consider any other point in order to dispose of the appeal, I would certainly be prepared to do so: for I take the view that, once leave to appeal is given to your Lordships' House, all points are open as well as the point stated: and that it is not correct for the Court of Criminal Appeal to limit the appeal to the point which they consider to be of general public importance. Your Lordships will be well able, of course, to prevent any abuse of this power.

I would allow this appeal and restore the conviction of murder.

LORD MORRIS OF BORTH-Y-GEST: My Lords, the Court of Criminal Appeal have certified that a point of law of general public importance was involved in their decision. Their decision, shortly stated, was that the conviction of the appellant ought to be set aside because the jury were wrongly directed. The point of law as defined in the certificate of the Court of Criminal Appeal can only have relevance and significance if it is related to their decision that the summing-up was open to criticism on the ground that there was misdirection. As the point of law stated by the Court of Criminal Appeal is not a theoretical one but a practical one, it must be taken to postulate that there was evidence from which the jury could have held that the accused had been in a psychopathic condition, that such condition was quiescent, that he voluntarily consumed intoxicating liquor, and afterwards had an "explosive outburst," and to raise the question whether on such basis the jury was incorrectly directed as to the application of the rules in M'NAGHTEN's case (*supra*). The submission of the appellant was that there was no misdirection.

On the part of the case dealing with insanity the issue before the jury was whether the accused at the time of the killing was suffering from a disease of the mind, which disease had the effect of producing a defect of reason so that either he did not know the nature and quality of the act he was doing or that he did not know that it was wrong. If he had any disease of the mind, he had it prior to and in the morning of September 7: it was immaterial how it was caused, though, if the accused had any disease of the mind, it was not of a kind that was caused by drink. If he had a disease of the mind in the morning, I do not read the medical evidence as suggesting that some later consumption of alcohol altered the nature of the disease. Nor do I read the medical evidence as suggesting that any disease of the mind originated during the day. It was said that the accused had a disease of the mind which was "episodic" in that it made him liable to have outbursts. If there was some explosive outburst resulting either in his not knowing what he was doing or not knowing that it was wrong, there would only be applicability of the M'Naghten Rules if such explosive outburst was a manifestation of, or a result of, some disease of the mind which existed in the morning. If there was some explosive outburst which resulted from drink and not from a disease of the mind, then the M'Naghten Rules would not be applicable. It was for the accused at the trial to show that his actions at the time of the killing were manifestations of a disease of the mind and not manifestations of being under the influence of alcohol.

Since in the present case it was not suggested that, if the accused had some disease of the mind, it had not existed at the start of the day and throughout the day, a consideration

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as to whether such disease existed in the morning was equally a consideration as to whether it existed "at the time of the committing of the act." When the learned Lord Chief Justice told the jury in his summing-up that they should come to their conclusion without reference to the drink that the accused took on September 7, and should direct their attention to the state of his mind in the morning before he opened the bottle of whisky, he was helpfully reminding them that, for the M'Naghten Rules to apply, the defect of reason producing a condition of either not knowing the nature and quality of the act being done or of not knowing that it was wrong must be the result of a disease of the mind and not the result of being under the influence of drink. The learned Lord Chief Justice was pointing out the difference between the possible case where a psychopath does something because he is drunk and the possible case where a psychopath does something because he is a psychopath.

The many references in the summing-up to the tests in regard to the knowledge of the accused (*i.e.*, his knowledge as to the nature and quality of the act he was doing or as to whether it was wrong) must in the nature of things have had reference to the moment of time of the act (*i.e.*, the killing) which was in question. The learned Lord Chief Justice summarised all the medical evidence very carefully. The most that Dr. Dawson could say in regard to the accused's knowledge was that, assuming that the accused "may have been under the influence of alcohol," he (Dr. Dawson) expressed a "very real doubt" as to the accused's knowledge in the material respects; if it were assumed that the accused had not had alcohol, Dr. Dawson expressed "a doubt" as to the accused's knowledge.

If the jury thought that the accused did have a disease of the mind, then such disease of the mind existed on the morning of September 7, and before the defence of insanity could succeed the jury would have had to have been of the opinion that that disease of the mind was of such a kind that it could produce, and that it did produce, a defect of reason which had

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the result that the accused either did not know what he was doing or did not know that it was wrong.

Having these considerations in mind, it seems to me that, read as a whole, the summing-up did not wrongly direct the jury in their consideration of the issue of insanity.

I would allow the appeal.

Appeal allowed.
Conviction of murder restored.

Solicitors: Linklaters & Paines, agents for Richard F. Sheldon, Chief Crown Solicitor, Belfast, for the Crown; J. Tickle & Co., agents for David Gordon, Belfast, for the respondent.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE SALMON AND MR. JUSTICE WINN

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Summing-up—Murder—Defence of Manslaughter not Raised—Evidence of Provocation—Material Justifying Verdict of Manslaughter—Duty of Judge—Verdict of Manslaughter Substituted.

On a charge of murder, if there is any material which would justify a verdict of manslaughter (*e.g.*, evidence of provocation), it is the duty of the judge to direct the jury on the possibility of such a verdict, even though the issue has not been raised by the defence and is inconsistent with the defence which has been raised.

HOPPER (1915) 11 Cr.App.R. 136; [1915] 2 K.B. 439 and BULLARD *v.* R. (1957) 42 Cr.App.R. 1; [1957] A.C. 635 followed.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on July 4, 1961, of capital murder of his stepfather and was sentenced by Glyn Jones J. to death.

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On the evening in question a kind of "gang warfare" had broken out between the appellant and his family and a family named Copley and their friends. After the appellant arrived home an organised attack was made on his home by at least four men. The appellant's step-father went into the front room, where he became involved in a struggle with one or more members of the Copley gang. He shouted "George, George, they're tooled up, get the gun." The appellant said that he saw his step-father being held astride the window by two men, one of whom had a knife close to his throat. The appellant then fired and hit his step-father. Afterwards in the front garden he shot two of the Copley gang. His defence at the trial was that the shooting was done in defence of a near relative who was in imminent danger, and also that he fired in defence of his house which was being attacked by armed men. At no time during the trial was there a suggestion that a verdict of manslaughter was open on the evidence, and in his summing-up the judge did not refer to the possibility of such a verdict.

Victor Durand, Q.C. (*R. D. L. du Cann* with him), for the appellant. It is conceded that the question of manslaughter was never raised at the trial, but there was evidence of provocation sufficient to justify a verdict of manslaughter, and in those circumstances, on the authorities, the judge should have left the issue to the jury. [He referred to HOPPER (1915) 11 Cr.App.R. 136; [1915] 2 K.B. 439; KWAKU MENSHAH *v.* R. [1946] A.C. 83; BULLARD *v.* R (1957) 42 Cr.App.R. 1; [1957] A.C. 635]. Further, the judge did not adequately warn the jury that an important witness for the prosecution, Clarke, was akin to an accomplice and as such required corroboration. [He referred to GOLDER (1960) 45 Cr.App.R. 5; [1960] 1 W.L.R. 1169 and PRATER (1960) 44 Cr.App.R. 83; [1960] 2 Q.B. 464.] Again, there were passages at the end of the summing-up where the judge used language which might have misled the jury with regard to the defence of self-defence.

Mervyn Griffith-Jones (*A. M. Morton* with him), for the Crown. On the appellant's own evidence that he took

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deliberate aim at the man who he said was assaulting his step-father, it is difficult to see how any question of provocation could have arisen, and the judge was under no obligation to leave this issue to the jury.

ASHWORTH J.: This appellant, George Anthony Porritt, was convicted on July 4, 1961, at the Central Criminal Court of capital murder, the victim whom he undoubtedly shot was Albert Leonard Porritt, his step-father, and he was sentenced to death.

The evening in question had begun with trouble between two families, the Copleys on the one side and their friends, and the present appellant and his wife, who had met at a club some fifteen or twenty miles out of London. The women fell out and fought each other, and on the way home there was something which no one suggests was an accident. Somehow or other two cars came into collision, and that provoked further trouble. According to the evidence, the appellant went home and went round to the Copleys' house where further trouble ensued as a result of which the windscreen of the appellant's car was smashed. He was persuaded or otherwise induced to go back to the Copleys to look for the other car which had been left immobile below Swanley. He went back, having, according to him, first picked up his step-father, who chose for the occasion to take with him a revolver and something like twenty rounds of ammunition.

When the appellant reached Swanley, he recognised the two cars of the Copley party, reversed his own car, drove past the two Copley cars, was greeted with a volley of stones, and then drew up and someone in the appellant's car fired two shots out of a revolver. According to the appellant, it was his step-father who fired these shots and thereafter, said the appellant, he removed the revolver from his step-father's possession together with the ammunition and went home. Meanwhile, an attack had been made on the appellant's home in the course of which the front door glass had been smashed in. According to the appellant, as he reached home, he became

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aware that the Copley party was in the neighbourhood, so he left his car some streets away and arrived home by devious ways over back garden walls and went into the house. The party assembled in the appellant's house consisted of himself and his step-father and mother, and, I think, another woman, two children and his step-brother. At some time fairly soon thereafter there was undoubtedly an organised attack on the appellant's house. How many men were involved in it may not be altogether clear, but there were at least four, and those in the house became aware that this attack was being launched, because, according to the appellant, there was shouting and hollering outside and the sound of crashing glass probably caused by the flinging of the lid of a dustbin through the window, and the victim, the appellant's step-father, went into the front room to investigate what was going on.

When he reached the front room, although the evidence is by no means clear, it seems that he became involved in a struggle with one or more members of the Copley gang and, because he was having difficulty, called for assistance. According to the appellant, his step-father said to him: "George, George, they are tooled up. Get the gun." The appellant had already heard the smashing of glass, what he described as a lot of hollering and shouting, and someone shout out: "Give him the knife," accordingly, he took the gun and went into the front room. His version of what happened, which did not tally in the least with the Crown evidence, was that on arrival in the front room he saw his step-father astride the window sill held by two men, one of whom held a knife close to the step-father's throat. This much may be said in favour of the appellant's version that, when the victim was examined after his death, it was found that there was undoubtedly a cut wound somewhere on his face or neck, and that his shirt had been ripped. There were also found in the garden or on the window sill two knives. The appellant was asked what he did, and he said: "I pulled the gun from my pocket. I pointed it at the man who had the knife on my father's neck and he had his arm round his

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neck and my father was right forward like that," and he said he fired the gun. The assailant was the appellant and the victim fell on the floor and died. Thereafter there was an ugly scene in the front garden in which the appellant undoubtedly fired the same revolver, having reloaded it, and shot two others who had formed part of the Copley party. Eventually the gun was thrown away.

The appellant at first told a number of lies to the police, but when it came to his trial the defence which he put forward throughout was that the shooting of the gun which resulted in the killing of his step-father was shooting in defence of a near relative then in imminent danger of being killed. Parallel with that was the defence that he had fired in defence of his own property, his own home, which was then being attacked by armed raiders. At the trial it was conceded on behalf of the Crown that, if the jury took the view that the firing was done in the honest belief that it was necessary for the protection of his step-father, then the proper verdict was one of Not Guilty, and a similar concession was made in regard to the possibility of an honest belief that it was reasonably necessary to protect the house by shooting. The defence had stressed the fact throughout the case that that was the appellant's frame of mind and that, accordingly, he should be acquitted.

It is worth emphasising, in view of the decision to which this court has come, that at no time in the course of the trial at the Central Criminal Court was there any suggestion that a verdict of manslaughter was open on the evidence. Such a verdict was not sought by the defence nor was it suggested by the Crown or by the learned judge. So far as the defence is concerned, it is perhaps right to say this, that concentrating, as Mr. Durand was, on securing, if possible, an out-and-out acquittal, he was understandably reluctant to introduce further issues which might result in the appellant being found Not Guilty of capital murder, but nonetheless Guilty of manslaughter and so liable to a term of imprisonment. Nonetheless, the possibility of a verdict of manslaughter in circumstances such as I have endeavoured shortly to describe was something one would have expected would be in the minds of those engaged in the case.

In the course of his summing-up the learned judge did not refer once to the word "manslaughter," and it is only when the appeal is brought before this court that it is submitted on behalf of the appellant that the jury should have been directed on this evidence that it was open to them to find a verdict of manslaughter on the ground of provocation. It is only fair to the learned judge, whose conduct of the trial has been the subject of a warm tribute by counsel on both sides, to point out that he was never invited to leave this issue to the jury. No mention of it was made to the learned judge who, having seen a number of law books behind counsel, enquired whether any submission was to be made. There was complete silence so far as the learned judge was concerned, and he proceeded to direct the jury on the only issues actually raised before him.

Before dealing with this question of provocation, it is perhaps convenient to dispose shortly of two other matters raised in support of this appeal. The first of them relates to a witness named Clarke. He had arrived at the appellant's house in company with the Copleys; indeed, he had been fetched by one of the women on the Copley side and had been induced to get out of bed and join the raiding party. Undoubtedly, Clarke had not told the truth at the magistrates' court. Undoubtedly, he had lied to the police. When he came to the trial at the Central Criminal Court, by way of contrast with one or two of the other witnesses, members of the Copley party who were called to give evidence, the man Clarke proceeded to describe in very considerable detail what, according to him, occurred at the appellant's house that night. His version, with which I need not deal in detail, was utterly different from that put forward by the appellant. The complaint that is made is that in these circumstances Clarke should have been regarded, if not as an accomplice, as someone so close to an accomplice that the learned judge was called upon to direct the jury by warning them of the danger of relying

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on his evidence unless it were corroborated. Reliance was placed upon two cases in this court, GOLDER (1960) 45 Cr. App.R. 5; [1960] 1 W.L.R. 1169, and PRATER (1960) 44 Cr. App.R. 83; [1960] 2 Q.B. 464. In particular in PRATER's case (*supra*) reliance was placed on the passage at p. 85 in the Criminal Appeal Reports, in which it was said: " For the purposes of this present appeal, this court is content to accept that, whether the label to be attached to Welham in this case was strictly that of an accomplice or not, in practice it is desirable that a warning should be given that the witness, whether he comes from the dock, as in this case, or whether he be a Crown witness, may be a witness with some purpose of his own to serve." It is to be noted that in that case it was a co-defendant who was seeking to shed some of his own responsibility by attributing the blame to a co-defendant. Nothing of the sort is applicable here.

When one comes to see what the learned judge said about the matter, it will be found that he dealt with Clarke's evidence with particular care and separately on its own. At p. 246 he starts in what turned out to be five or six pages of transcript by concentrating on Clarke's evidence, which was undoubtedly of very great importance. In the course of dealing with it he repeated the comments made by Mr. Durand, " that the witness admitted not only that he had failed to say in the magistrates' court what he had said here, but also that some of the things he had said in the magistrates' court were wholly inconsistent with what he said here and that, if what he said here was true, what he said in the magistrates' court must have been a lie." Then he went on: " Now, you will bear in mind that cross-examination and all those criticisms of Mr. Clarke's evidence, but you will also bear in mind the possibility that Mr. Clarke is a man who for some reason has made up his mind since the magistrates' court to tell you the truth, or at least most of the truth; and it is a matter for you, but if you think you have heard in that evidence the authentic voice of truth, at any rate in what he said from the moment when Porritt was jumping through the window and was shot, why then, you are entitled, you know, to give effect to it if that is your honest belief." Right at the end of that passage he emphasised again the point to which I have alluded. On p. 251 he said: " Then he was very much cross-examined, and rightly cross-examined, by Mr. Durand, and he admitted to Mr. Durand, as I say, that what he had said at the magistrates' court was not the whole truth and he said that he told lies there because he was a little frightened of George Porritt really, he did not want to say any more against him than he had to, and, what is more, he was not feeling very well at the magistrates' court. I am not going to go through the whole of that cross-examination; it is an effective cross-examination, and it is entirely for you to say if you find, as I have said, the voice of truth in that man so far as he described what happened after the scuffle between Len Porritt and Copley."

In the view of this court, any jury which had heard the cross-examination of this man Clarke and realised that he had told lies on one occasion and another and who then heard that passage and the whole of those five pages, must have realised that it was incumbent upon them to examine his evidence with great care. This court sees no ground for criticising the learned judge's summing-up on that point.

It was then said that right at the end of the summing-up the learned judge used expressions which were misleading or might mislead the jury in regard to the defence. The passage in question is this: " But if you are satisfied beyond reasonable doubt that on that night there was a kind of gang warfare going on between this man on the one hand and the Copley party on the other, if you find the production of the pistol and the firing of those shots was no more, really, than a hostile act committed by him in the course of the gang warfare, then you cannot possibly find the shooting was justifiable, and your verdict would be one of guilty of murder and capital murder at that." It may be that, taken by itself, that sentence would be open to criticism, because it might still be a case of self-defence albeit that it was a hostile act in the course of gang warfare; but when one recalls the fact that only a moment before the learned judge had with complete accuracy and fairness summarised the defence and told the jury that if they were in any doubt on this issue of self-defence they were to acquit, then the sentence which is now criticised takes on a different colour. The matter is placed beyond controversy by the concluding words of the summing-up given at the request of counsel for the appellant, when the learned judge said: "If I have not made it clear I will repeat again that the burden is on the prosecution to satisfy you, and if you are in any doubt whether this man's story is true, why then, the prosecution have not proved it is not true. Does that cover the point?," and counsel said: "Yes." On that ground also the appeal will fail.

It is now necessary to turn to the ground on which, in the opinion of this court, the appeal succeeds. As has already been said, the issue of manslaughter was not raised at the trial, but there is ample authority for the view that notwithstanding the fact that a particular issue is not raised by the defence, it is incumbent upon the judge trying the case, if the evidence justifies it, to leave such issue to the jury. The leading case, so far as chronology is concerned, is the case in this court of HOPPER (1915) 11 Cr.App.R. 136; [1915] 2 K.B. 439, but the same principle has been emphasised in a number of other cases and, for convenience, one can read what I think is the last of them, BULLARD *v.* R. (1957) 42 Cr.App.R. 1; [1957] A.C. 635. In that case Lord Tucker, giving the judgment of the Privy Council (at pp. 5 and 642 of the respective reports) said: "It has long been settled law that if on the evidence, whether of the prosecution or of the defence, there is any evidence of provocation fit to be left to a jury, and whether or not this issue has been specifically raised at the trial by counsel for the defence and whether or not the accused had said in terms that he was provoked, it is the duty of the judge, after a proper direction, to leave it open to the jury to return a verdict of manslaughter if they are not satisfied beyond reasonable doubt that the killing was unprovoked."

While that case is being cited, it is perhaps convenient to refer to a further passage ((1957) 42 Cr.App.R. at p. 7; [1957] A.C. at p. 643): " In the present case the fact that the jury rejected the defence of self-defence does not necessarily mean that the evidence for the defence was not of such kind that, even if not accepted in its entirety, it might not have left them in reasonable doubt whether the prosecution had discharged the onus which lay on them of proving that the killing was unprovoked. Their Lordships do not shrink from saying that such a result would have been improbable, but they cannot say that it would have been impossible." The issue is whether there was on the evidence any material which made it incumbent on the learned judge to leave that issue.

The relevant statutory provision is section 3 of the Homicide Act, 1957, which provides: " Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

It is to be noted that in BULLARD's case (*supra*) reference was made to the fact that the issue must be left whether or not the accused man said he was provoked or not, and in one of the reported cases, which are all referred to in BULLARD's case (*supra*) and others, it was pointed out that notwithstanding the fact that the accused at his trial had in terms stated that he was not angry, nonetheless the jury should have been directed on the issue of manslaughter, because it might be that they would not accept his view that he was not angry. In the present case there was not a word in the whole course of the appellant's evidence to suggest in terms that he was provoked. There was nothing to suggest that he had lost his

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self-control when he fired that shot. Indeed, as Mr. Griffith-Jones said, his evidence on the point tended the other way to the effect that he took deliberate aim at the man who, he said, was assaulting his step-father, and fired. On the other hand, it may perhaps be mentioned that when that shooting was over, beyond all question the appellant jumped out of the window of that house and, to use the words of one of the witnesses, ran about like an antelope and behaved in a manner which on one view indicated very considerable loss of self-control. The jury in considering the matter, if it had been left, might—and it is unnecessary to say more—have taken the view that the appellant at the moment when he fired the shot which killed his step-father had already lost his self-control in the same way as the evidence appeared to indicate he had lost it afterwards.

The matter can be approached in two ways: First of all, if the appellant's description of the scene in the front room were accepted by the jury, it did not follow that they must necessarily acquit the appellant on the ground of self-defence, because the defence of self-defence not only involved the dangerous assault on the step-father, but also involved a frame of mind in the appellant that he honestly thought it was reasonably necessary to fire. It may be that the jury in convicting the appellant, as they did, were not satisfied on that limb, but both in the course of Mr. Griffith-Jones' address to the jury and on several occasions in the summing-up the learned judge had referred to both those limbs of the defence which I have called self-defence. It is possible that the jury in considering the matter might have found that the description of the scene in that front room as told by the appellant was accurate. They might not have accepted that it was reasonably necessary to fire but, if they had had to consider the matter, they might have thought—one does not know—that the sight of his step-father in imminent peril came as such a shock to this man as the culmination of a stormy evening that he was no longer the master of his mind and shot on provocation. If they took that view or, better still, if that view were not

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displaced by the prosecution, then the proper verdict would be manslaughter.

That would be one approach, but the other is equally clear. After all, this was the culmination of a very stormy evening and, while it is quite true that the events in the club in Kent had happened so long ago that they were given time to cool, nonetheless they were part of the story, and one can regard it as possible that a jury might consider that story as reaching its climax with the second attack on the appellant's house when he heard, using only his own evidence, hollering and shouting, the breaking of glass outside and the voice crying: " Use the knife," and his step-father saying: " George, George, they are tooled up. Get the gun," and that at that moment his self-control evaporated. As I venture to say, one does not know, but, in the view of this court, the matters to which reference has been made were material on which a jury could have come to the conclusion that this killing was killing after provocation and, accordingly, would justify a verdict of manslaughter.

For those reasons, this court will allow this appeal in regard to conviction, and will substitute a verdict of manslaughter as was done in one of the cases to which the attention of the court was directed [KWAKU MENSAH *v.* R. [1946] A.C. 83].

This court has carefully considered what is the appropriate sentence in this case. It was in every sense of the word a very terrible crime. The use of the gun, albeit under provocation, with the intention to kill and wound as the climax of an evening of what has been called gang warfare is a matter which deserves and will now receive severe punishment. The sentence of the court is that this appellant be imprisoned for ten years.

Appeal allowed.
Verdict and sentence substituted.

Solicitors: Rees, Daultry & Co., for the appellants.

BEFORE

MR. JUSTICE ASHWORTH, MR. JUSTICE SALMON AND
MR. JUSTICE WINN

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LEONARD THOMAS TILLEY
GEORGE RICHARD TILLEY

Handwriting—No Expert Evidence—Jury Invited to Form own View by Comparison of Documents—Comments by Judge on Alleged Similarity of Letters—Convictions Quashed.

A jury should not be left to decide questions of disputed handwriting on their own without the assistance of expert evidence.

RICKARD (1918) 13 Cr.App.R. 140 and DAY (1940) 27 Cr. App.R. 168 followed.

A purported receipt had been put in evidence by the two appellants. At the trial each was in cross-examination asked to write out on a fresh piece of paper the actual wording of the receipt. During an overnight adjournment the receipt and the two documents written by the appellants in court were photographed. No expert evidence on handwriting had been called, nor had the Crown made any reference to alleged similarities between the handwriting of the receipt and that of either of the documents produced in court. In his summing-up, the judge invited the jury to form their own view on the genuineness of the receipt by comparing it with one of the documents written in court and expressed his own view on the similarity of certain letters.

Held, that the course pursued by the judge was not in accordance with principles previously laid down and that the convictions must be quashed.

Appeals against conviction.

The appellants were convicted at West Kent Quarter Sessions on January 20, 1961, of larceny and were sentenced by the Deputy-Chairman (Sir Reginald Sharpe, Q.C.), as to the first appellant to eighteen months' imprisonment and as to the second appellant to three years' corrective training.

The appellants were charged with stealing a car. When questioned by police officers, they said they had bought it

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that morning and produced a receipt bearing the date of the previous day. At the trial both appellants were, in cross-examination, asked to write out the wording of the receipt and these documents were made exhibits. No expert evidence on handwriting was called, nor had any reference been made by the prosecution to any question of similarity in handwriting. During an overnight adjournment, these exhibits and the original receipt were photographed and before the summing-up the jury were supplied with magnifying glasses. In his summing-up the Deputy-Chairman invited the jury to form their own view on the genuineness of the original receipt by comparing it with one of the later exhibits and expressed his own view on similarity of letters in the two documents.

Robin Simpson, for the appellants. Though there is no absolute rule that a jury may not be asked to compare admitted with disputed handwriting without the aid of expert evidence, the practice has been regarded as undesirable: HARVEY (1869) 11 Cox 546; RICKARD (1918) 13 Cr.App.R. 140; DAY (1940) 27 Cr.App.R. 168. In the present case, however, what was done was particularly irregular because no reference at all had been made to the question of alleged similarity in handwriting until the Deputy-Chairman came to sum up. It was not right for him at that stage to raise an issue which had not been raised by the Crown and to depart from accepted practice by commenting on the documents himself and handing them to the jury for comparison without the assistance of expert evidence. If the appellants had been given the opportunity by the issue being raised at an earlier stage, they might have been in a position to call expert evidence themselves.

G. H. Rooke for the Crown. There is no definite rule that a jury may not be asked to decide a question of disputed handwriting without the assistance of an expert, and in RICKARD (*supra*) the Court of Criminal Appeal did so. Even if it be held that the conduct of the Deputy-Chairman exceeded permitted practice by reason of the comments which he himself made on alleged similarities and to that extent was irregular,

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the evidence against the appellants was certainly very strong and it is submitted that this is a case where the court might apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

ASHWORTH J.: These two appellants, George Richard Tilley and Leonard Thomas Tilley, were convicted at the West Kent Quarter Sessions of larceny. One of them was sentenced to eighteen months' imprisonment and the other to three years' corrective training.

The charge arose out of an incident which occurred late in September, 1960. It seems that an American serving officer or man left a Morris car by the side of the road. Not long afterwards, according to the two appellants, they came upon a man named Warren who was standing by the car, and he sold it to them for £4, the value, according to the owner, being £7. The two appellants, according to their evidence, took the precaution of obtaining from Warren a receipt, and that receipt is exhibit 1. On September 29, the day after the date which the receipt bears, the two appellants were found in broad daylight in the morning about two miles away from the main road up a lane engaged in breaking up this motor-car with oxy-acetylene apparatus. They were asked what they were doing by two police officers, and they said that the car was in fact their property and that they had bought it that morning for £4, and they produced the receipt to corroborate their statements. The police officers did not observe that the date on the receipt did not tally with the statement that the car had been bought that morning and handed the receipt back to the men. They were in due course charged with larceny and stood their trial.

The trial seems to have proceeded with commendable speed, and in the course of the afternoon both the appellants were giving evidence, and in the course of cross-examination each of them was asked to write out on a fresh piece of paper the self-same wording as appears on exhibit 1, and so there came into existence exhibits 4 and 5, signed by Leonard and George respectively. Nothing turns on exhibit 5, which was plainly written in a different hand from that which wrote exhibit 1, but it was thought by some that exhibits 1 and 4 showed signs of similarity. Counsel for the Crown perfectly properly did not pursue the matter, having obtained exhibit 4 from Leonard. He took a look at it and there did not appear to him, as he has informed us, to be any striking similarities, and so he left it. In passing, it may be said that the Crown case was that while exhibit 1 might have been written by someone other than the accused, it was a document with which they had armed themselves prior to the theft of the car, so that they could afford at once an explanation of their possession of it.

At the conclusion of the evidence for the defence, speeches were made, and then the court adjourned, and it is a fair inference that at the adjournment arrangements were made to have the two new exhibits photographed and magnifying glasses made available for the jury, and the Deputy-Chairman summed up the following day.

In the course of his summing-up, the matter not having been mentioned again after the production of exhibits 4 and 5, he invited the jury to consider these exhibits in relation to exhibit 1, the document produced to the police, and in a number of pages of the transcript there appear comments made by the Deputy-Chairman as to the similarities of various letters appearing in each document, and there is no doubt he did invite the jury—leaving it entirely to them to reach any decision they thought right—to consider with care these documents so that they might make up their minds whether exhibit 1 was a genuine receipt received from the vendor of the car, Warren, or alternatively a fabricated document which Leonard Tilley had brought into existence, forearming himself before inquiry. This was the first time this matter had been canvassed, and criticism is now made by Mr. Simpson on behalf of the two appellants that it was not right or fair that the defence should suddenly be met with this kind of address to the jury on a topic which had never been ventilated throughout the trial. Moreover, it was said that the topic was one on which the Crown had not relied and in regard to it, if the appellants had had an opportunity, they might have been in a position to call expert evidence. Those criticisms were, we think, of considerable force. But the matter goes even further. The question arises whether in any case it was proper for the learned Deputy-Chairman to indulge in comments himself about these documents and then hand them to the jury for their consideration and decision without any evidence having been called to assist them on that issue.

The matter has come before the court in more than one previous case. One to which our attention was called was Harvey (1869) 11 Cox 546. The matter was also raised in Rickard (1918) 13 Cr.App.R. 140. In that case Salter J., giving the judgment of this court, said this, after referring to section 8 of Lord Denman's Act: "That case"—the case of Crouch (1850) 4 Cox 163—"does not decide what degree of preparation is necessary to constitute an expert, but it does decide that a person is not entitled to give such evidence if his only knowledge on the subject is that acquired in the course of the case. That was the position of the police officer, and the position of Busby is less satisfactory. Therefore no expert evidence at all was given in the case. This court does not decide that expert evidence in such cases is necessary, and the observations of Blackburn J. in Harvey (*supra*) do not so decide, but it is clear from the nature of things that to leave a question of handwriting to a jury without assistance is a somewhat dangerous course."

In the present case there was no evidence, not even questions directed to alleged similarities, and the matter only arose in the course of the summing-up. This court endorses and reaffirms the statement of principle to be found in Salter J.'s judgment on behalf of this court in Rickard (*supra*). A jury should not be left unassisted to decide questions of disputed handwriting on their own.

It is also to be noted that although the case of Day (1940) 27 Cr.App.R. 168, raised in the main an utterly different

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issue, the question of handwriting did occur, and the learned judge, Croom-Johnson J. ruled that the jury could not be asked to do that, that is to say, compare handwriting, without some assistance by way of expert evidence, and that ruling was once again in conformity with the decision in RICKARD'S case (*supra*).

In these circumstances, in the view of this court, it is right to say that the course pursued by the learned Deputy-Chairman was not in accordance with the principles previously laid down, and should not be followed in any other case. On the other hand, this court has had to consider with some care whether the effect of what was done was so serious as to render it incumbent on this court to allow the appeal and release these two appellants. The reason why that matter has caused some misgiving is that undoubtedly there was some strong evidence against these two men, and the jury did not believe them, but, having regard to the importance which the learned Deputy-Chairman evidently attached to the question of handwriting and the possibility that the receipt, exhibit 1, was fabricated, this court feels that his comments may have weighed heavily with the jury and, in the circumstances, it would not be right to apply the proviso. Accordingly, these two appeals must be allowed and the convictions quashed.

Convictions quashed.

Solicitors: Peters & Peters, for the appellants; N. K. Cooper, Maidstone, for the Crown.

BEFORE

MR. JUSTICE SLADE, MR. JUSTICE HAVERS AND
MR. JUSTICE SACHS

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EDWARD JAMES HALL

Summing-up—Manslaughter—Unlawful Act—Undisputed Facts—Knife Admittedly Used to Frighten Victim—Decision of Judge that Act was Dangerous.

The appellant followed his wife and a man with whom he believed she was associating towards a wood. Before doing so he had taken a sharp knife, wrapped it in newspaper and put it into his pocket. When he started to search a car park in the vicinity of the wood he took the knife out of his pocket and unwrapped it. The appellant stated that his intention in so doing was to use the knife to frighten his wife and any man in whose company he might find her. He suddenly saw a man whom he recognised as one W. and went forward towards him with the knife still in his hand. W. walked towards the appellant, and soon afterwards W. received a deep wound from the knife, from which he died. The judge directed the jury: "If, when [the appellant] went into the car park and produced that knife, the intention in his mind was to use it for the unlawful purpose of terrifying his wife, that alone might well amount to an assault, and if, in consequence of his having produced this knife, he accidentally stabbed W. with it, then I direct you, as a matter of law, that that is manslaughter. He is using a knife, a dangerous weapon, for an unlawful purpose, and if the result is death, then you must find him guilty of manslaughter."

Held, that the direction was correct in law.

LARKIN (1942) 29 Cr.App.R. 18; [1943] K.B. 174 followed.

Appeal against conviction.

The appellant was convicted at Sussex Assizes on March 21, 1960, and was sentenced by Glyn-Jones J. to five years' imprisonment.

The appellant was carrying a sharp and unsheathed knife, according to him for the purpose of frightening his wife and any man with whom he found her in association. He suddenly saw in a wood a man whom he recognised and approached him with the knife still in his hand, and soon afterwards the man received a deep wound from which he died. At the trial the defence of the appellant was (i) provocation and (ii) accident. With regard to provocation, the judge ruled that there was no evidence to go to the jury, and with regard to accident, he directed the jury that on the undisputed facts the knife was being used by the appellant for an unlawful purpose and that, if death resulted from that use, the verdict must be manslaughter. The further facts and the relevant portions of the summing-up are set out in the judgment.

Edward Clarke, Q.C. (*H. B. Grant* with him), for the appellant. On the evidence in the present case there was no assault in law, and the judge was wrong in saying that the appellant was guilty of an assault and, therefore, of an unlawful act. It must, however, be conceded that in using the knife as he did the appellant was guilty of an offence under section 1 of the Prevention of Crime Act, 1953, and that in that sense his act was unlawful. On that basis the position in law appears to be correctly set out in *Russell on Crime*, 11th ed., p. 651 and the authorities there cited and in Archbold's *Criminal Pleading*. [SLADE J. Have you considered the decision in LARKIN (1942) 29 Cr.App.R. 18; [1943] K.B. 174, which is not there set out, but which seems precisely applicable to the present case?] This court is bound by that decision, and the argument for the appellant must, therefore, be presented on a narrower basis. The issue whether the unlawful act of the appellant was one likely to cause injury ought to have been left to the jury. The judge's summing-up should have contained some words such as " if you consider that that use of the knife was likely to cause injury and if death resulted, then the appellant would be guilty of manslaughter." He should not have assumed, as he did, that the use was likely to cause injury. The question was, at any rate, one of mixed law and fact, and should not have been decided by the judge alone.

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F. D. L. McIntyre, Q.C. and *A. Babington*, for the Crown, were not called on to argue.

SACHS J.: The appellant in this case was tried at Lewes Assizes on March 20–21, 1961, following an indictment which charged him with the murder of one Wood. The jury found him not guilty of this charge, but guilty of manslaughter, whereupon he was sentenced to imprisonment for a term of five years.

Upon application for leave to appeal against conviction and sentence the matter came before the court on May 30, without there having been settled any grounds for appeal, save the applicant's submission that the judge had misdirected the jury on grounds which would be settled by counsel. The court refused leave to appeal against sentence, but gave leave to appeal against conviction, saying that it was arguable that one passage in the direction of the learned judge might not accord with the authorities. Reference will be made in detail to that passage.

None of the evidence adduced on behalf of the prosecution was challenged, and the account of what happened had to be gathered in the main from the statements and evidence of the accused. The facts of the case can accordingly be relatively compactly stated as follows. The appellant, in circumstances which would appeal to the sympathy of a jury as regards a murder charge, became suspicious of his wife's conduct, and on January 12 made inquiries which led him to believe that Wood was the man with whom she was probably associating. On January 13, he made further inquiries, and, as a result, decided to follow his wife about that afternoon. Before so doing he took from his sideboard a carving knife of great sharpness, wrapped it in newspaper and put it in his raincoat pocket. This, according to his own evidence, he did for the purpose of using it to scare his wife and the man, whoever he might turn out to be, who was associating with her. With that knife in his pocket he trailed his wife and saw her go into a car park. Deducing that she would be meeting Wood

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there, he himself started to search that car park, taking his knife out, unwrapping it and holding it pointed somewhat downwards.

According to a signed statement of his, Exhibit No. 7, the accuracy of the wording of which was never challenged on the appellant's behalf in cross-examination, he walked cautiously on and suddenly saw a man whom recognised as Wood. He continued forward with the knife still in his hand and spoke to Wood, who had his hands raised, though not in a fighting position, and who was also continuing to advance. That same written statement contains the following phrase: "As we came close to each other I lunged or struck him in the stomach, low down." According to the appellant's evidence on oath, when examined in chief, what happened at the critical moment was expressed in an answer: "We came together, and naturally the knife went into him. I did not know actually where it had hit him. All I knew was, it had struck him low down." According to Dr. Camps' testimony, the wound penetrated at least four and a half inches into the front of the abdomen in the umbilical region, and the wound reached the spine.

Those, then, are the essential facts. It is convenient here to note that before the accused went into the witness box, his counsel, in answer to a question put by the judge, indicated that the defence was provocation. In the course of his evidence, however, the appellant suggested the killing could have been by accident. Accordingly, at the conclusion of the evidence, and before counsel addressed the jury, there was a discussion on points of law in their absence.

As regards the defence of provocation, Glyn-Jones J. then ruled that there was no evidence to go to the jury. As regards the defence of accident, he indicated that on the facts of the case the knife was being used for an unlawful purpose, and that if death resulted, the proper verdict was manslaughter. On this latter point Mr. Clarke submitted that the verdict should be "not guilty" on the ground that the mere possession of a dangerous weapon was not of itself a sufficient act to

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cause a resulting accident to be manslaughter. Quite rightly, the knife was not referred to by Mr. Clarke as anything other than a dangerous weapon; nor was any submission made that for a man to close with Wood in the way that the appellant in fact did was conduct that did not involve risk of injury to Wood. Indeed, no such submission could have had the slightest prospect of success.

At the conclusion of the discussion Mr. Clarke addressed the jury and dealt fully with the question of provocation, despite the judge's ruling. He also, of course, addressed them on the other issues, including the defence of accident. In the course of a careful and accurate summing-up the learned judge dealt fully with all the matters appropriate to the various relevant issues. No complaint is made as to any of those directions, save one short passage to which I am about to refer. Before so doing, however, it is to be noted that he expressly withdrew in his summing-up the issue of provocation from the jury, taking that course in accordance with the ruling he had previously given. On that point—the withdrawal of the issue of provocation—the court which considered the application on May 30 for leave to appeal stated that the reasons given by the learned judge for so doing appeared entirely satisfactory, a view with which this court agrees.

I now turn to the single passage which Mr. Clarke has submitted to contain a misdirection. After referring to the fact that the appellant, when he went into the car park, produced and unwrapped the knife, and to the further fact that he had stated his intention was to use the knife to frighten his wife and any man in whose company he might find her, the learned judge went on as follows: "If, when he went into the car park and produced that knife, the intention in his mind was to use it for the unlawful purpose of terrifying his wife and this man, that alone might well amount to an assault, and if, in consequence of his having produced this knife, he accidentally stabbed Wood with it, then I direct you, as a matter of law, that that is manslaughter. He is using a knife, a dangerous weapon, for an unlawful purpose, and if the result is death, then you must find him guilty of manslaughter. If, then, you are not satisfied that this was a voluntary deliberate act, whereby he stabbed, then your proper verdict is not guilty of murder, but guilty of manslaughter."

It is convenient first to deal with the point whether the appellant was in the course of doing an unlawful act as he approached and closed with Wood. For a considerable period in the sustained argument, which he very properly and very lucidly in his client's interest put forward, Mr. Clarke pressed that the learned judge was wrong in so charging the jury He, of course, rightly conceded that it is for the judge to tell the jury whether or not an act is unlawful. If there is no dispute or doubt as to the facts, no authority is really needed on that point, but it is perhaps apt to quote from the judgment of the court, as pronounced by Humphreys J., in LARKIN (1942) 29 Cr.App.R. 18; [1943] K.B. 174, where he dealt with the parallel point in that case, in relation to facts to which I will later refer in more detail. The words of the judgment relevant to the present point are as follows: "Where facts are proved and accepted, then whether those facts amount to a crime or not must be a question of law, not of fact."

Mr. Clarke submitted, however, that on the facts in evidence in the present case there was no assault in law, and alternatively the issue was one which should, in the circumstances, have been left to the jury. Later, however, with his usual frankness, he admitted that the appellant in advancing and holding a knife was, in the circumstances of the present case, guilty of an offence under section 1 of the Prevention of Crime Act, 1953; that he, the appellant, was thus in the course of doing an unlawful act; and that, accordingly, it would not avail him in the present appeal if his conduct did not also constitute the particular unlawful act of assault referred to by the learned judge. It is therefore unnecessary to say more on the point as originally argued by Mr. Clarke than that this court considers that on the undisputed facts the appellant, when advancing towards Wood holding a knife with intent to scare as he approached Wood, was rightly considered by the judge to be guilty of an assault; and that the learned judge was correct in charging the jury that upon that basis the appellant was in the course of doing an unlawful act.

On that footing the only remaining point was whether the unlawful act was such that if death resulted the appellant was necessarily guilty of manslaughter. On that point one can turn at once to the judgment of Humphreys J. in LARKIN (*supra*), where he deals with the law apposite to a case such as the present one. The headnote correctly sets out the facts of that case and its effect as follows: " The undisputed facts were that the deceased woman had met her death as the result of her throat having been cut by a razor which belonged to the prisoner and was in the prisoner's hand when she received the cut. The prisoner's evidence was that he was flourishing the open razor for the purpose of frightening another person. The judge directed the jury that there could not, on the evidence, be a verdict of acquittal, that the verdict must be one either of murder or manslaughter, and that even if they accepted the prisoner's evidence to the full, the verdict must be one of manslaughter." Oliver J. had summed up so far as is material as follows: " A man who rushes into a house flourishing a naked razor and wounds someone, even accidentally, is still guilty of manslaughter if that person dies "; and he went on: " I have told you the law is for me, and I will tell you on my responsibility that in threatening a man with a naked razor because you wanted to scare him, however good reason you may have for disliking him, you are doing an unlawful act." Humphreys J. after distinguishing the class of case in which a lawful act is done negligently, and thus a class of case to which his judgment had no further reference, went on as follows, 29 Cr.App.R. at p. 23: " Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter." He went on to say that the law on that subject was summed up correctly in the then current edition of *Archbold* (that is to say the 30th edition) at page 900 and in the following pages.

Mr. Clarke cited a number of authorities, including *Russell on Crime*, 11th edition, p. 651, with a number of following pages, where, however, for some reason, LARKIN (*supra*) is not mentioned. Rightly, however, in the upshot he felt in due course constrained to agree that, by virtue of the judgment in LARKIN (*supra*), the issue that he desired to present in the present case became a narrow one as follows. He contended that the issue whether the unlawful act of the appellant was one likely to cause injury should have been left to the jury. He complained that the above-cited passage in the summing-up of Glyn-Jones J., took that issue from them. In effect, he submitted that instead of using the words, " He is using a knife, a dangerous weapon, for an unlawful purpose, and if the result is death, then you must find him guilty of manslaughter," there should have been substituted the following passage containing some additional words: " He is using a knife, a dangerous weapon, for an unlawful purpose, and if you consider that that use of the knife was likely to cause injury, and if death resulted, then you must find him guilty of manslaughter."

Whether an unlawful act is of such a character that a resulting death is necessarily manslaughter is a mixed question of fact and law. If the facts are in dispute or in doubt, the question whether they have that character by virtue of the likelihood of injury being caused should naturally be left to the jury. If, however, there is no such dispute and no such doubt and there can only be one proper answer to the question, it is open to the judge so to direct the jury.

Here again, as in LARKIN (*supra*), there was only one proper answer, and the judge was accordingly entitled to give the direction which he gave without going through the formula of saying that on the facts the jury must first find that the appellant's unlawful act was likely to injure the deceased, for it was in fact undisputed and clear that it was so likely.

In this connection it seems plain that on both sides the case was conducted on the footing that the way in which the

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appellant behaved when he encountered Wood was likely to cause injury to the latter; indeed, as I previously indicated, it would have been odd if the defence had suggested otherwise. The likelihood of such injury was on the uncontested facts of the case so clear that, even if Mr. Clarke were right in submitting that the jury should have been left to decide that fact, this court considers the application of the proviso to section 4 (1) of the Criminal Appeal Act, 1907, to be inevitable. For the reasons given, however, the summing-up, which was unchallengeable and unchallenged save as to one short passage, cannot be successfully appealed on that passage either. The appeal is dismissed.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE WINN AND MR. JUSTICE WIDGERY

1961
Feb. 13, 14

JOSEPH PETER CAVENDISH

Receiving Stolen Goods—Possession—Receiving by Servant in Absence of Master—Denial by Master on Return of Knowledge of Delivery—Evidence of Arrangement between Thief and Master.

In order to prove that a person had possession, actual or constructive, of goods alleged to have been stolen, something more must be proved than that the goods were found on that person's premises. If he was absent at the time when the goods were brought to his premises, it must be proved that on his return he became aware of their presence and exercised some control over them or that the goods arrived, albeit in his absence, at his invitation or by an arrangement to which he was a party. If delivery has been taken by a servant in his master's absence, the master can be convicted only if there is evidence that he gave the servant authority or instructions to accept the goods.

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JOSEPH PETER CAVENDISH

Parker L.C.J., Winn J., Widgery J.

Appeal against conviction and sentence.

The appellant was convicted at the County of London Sessions on August 5, 1960, of receiving stolen goods and was sentenced by the Deputy-Chairman to eighteen months' imprisonment.

The indictment alleged that on April 25, 1960, the appellant received six drums of gas oil, the property of L. G. Hydleman & Co., well knowing that property to have been stolen. The appellant was the proprietor of a transport business operating nine lorries and employing nine drivers and a fitter. It was not disputed that the goods were stolen goods nor that one Lisle, a lorry driver employed by the company named, had left the goods at the appellant's premises at a time when the appellant was absent. According to evidence tendered for the prosecution the driver, Lisle, and a fitter employed by the appellant, unloaded six drums of oil from the driver's lorry at the appellant's yard. They then loaded seven empty drums on to the lorry, which Lisle drove away. Apparently the fitter had not had any instructions to accept or knowledge about the oil drums that were unloaded; he was called at the trial as a witness for the defence, when he gave evidence that he had no warning that the oil drums would arrive and no instructions to load the empty drums. The lorry had arrived at the appellant's premises at about 3 p.m. on April 25, 1960. At 4.15 p.m. the appellant arrived in a car with his family, when he was approached by the police who told him they were making inquiries respecting the oil which had been left by the lorry driver; the appellant replied that he had been away most of the day and had just come back, and that the oil was nothing to do with him.

At the close of the evidence for the prosecution it was submitted on behalf of the appellant that there was no evidence of his having had possession of the property. After argument the Deputy-Chairman ruled that there was a case to go to the jury. Evidence for the defence was then heard. In summing up the Deputy-Chairman directed the jury, among other matters, that

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one essential element of the offence charged, which the prosecution had to prove, was that the goods were in the possession or under the control of the appellant. On the one hand, if unordered goods were dumped on a man's premises and he knew nothing about them, he had not received them into his possession. On the other hand, if the jury were satisfied that the appellant, being in communication with the driver, Lisle, had agreed to take the goods, there was evidence from which the jury could deduce that the appellant was in possession of the goods. Referring to the question of possession the Deputy-Chairman said: "We have, in law, something which is called constructive possession which, like so many other things, is only a question of common sense. One can receive something into one's possession constructively without actually physically taking it over. If one were dealing in stolen property, obviously it would not be necessary to receive every piece into one's own hands and to put it down oneself. If one is acting dishonestly in concert with somebody else, it is quite possible to have things left at one's premises, when one is not there; and it would be absurd for the law to say that although one knew about the whole thing and although it was all arranged, yet because one was not physically present when the goods arrived one was not guilty of the offence. . . . The defence is this. The [appellant] says 'I am the victim of the most appalling bad luck; I know nothing about this fuel oil whatsoever; it is agreed that I run a transport business, and a transport business in which fuel oil is used.' If you believe what he said to the police at the time, he tells you that at that particular time he was short of money, that his overheads were very considerable and that in fact his business was running almost hand to mouth. He is really saying this—'At that particular time, by the most appalling coincidence, a man who is a thief is coming along and is dumping, absolutely unknown to me, at my premises, stolen fuel oil.' It is a matter for you, members of the jury, what inferences you draw from the evidence which you have heard."

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B. E. Capstick, for the appellant. The Deputy-Chairman should not have left the case to the jury. There was no evidence that the appellant was in possession of the goods. The mere fact that they were found on his premises was obviously not sufficient. Here all that was proved was that the goods were found on the appellant's premises and that delivery had been taken of them by a servant in his absence. [He referred to SAVAGE (1906) 70 J.P. 36; MERRIMAN [1907] V.L.R. 1; PEARSON (No. 2) (1908) 1 Cr.App.R. 79.]

H. J. Leonard, for the Crown. There was evidence which would entitle the jury to draw the inference that the goods came to the appellant's premises as the result of an arrangement between him and the thief. This would amount to evidence of possession by the appellant. The decision in MERRIMAN (*supra*) to the contrary was disapproved by this court in FALLOWS [1948] W.N. 479.

THE LORD CHIEF JUSTICE: The case that was sought to be made against the appellant was that on April 25, 1960, a man called Lisle, who was employed as a driver for a company called Hydleman & Co., gave a short delivery at one of his places of call and took six barrels of oil, which he should have delivered to a customer, to the appellant's premises, a yard, where they were unloaded by one of the appellant's employees. Lisle at the same time took away from the yard seven empty barrels, and the case for the prosecution was that that delivery of oil by the thief must have been as a result of some arrangement between the appellant and the thief. The appellant was away at the time. When he came back and was questioned by the police, he at once denied that he knew anything about it. At the end of the case for the prosecution a submission was made that there was no case to be left to the jury that the appellant had possession or constructive possession of this oil. If he did have possession, it was a clear case of recent possession and called for an explanation. Pausing there, if the Deputy-Chairman was right in rejecting that submission, as he did, the court feels that, having regard to the evidence that thereafter was called on behalf of the defence, it was perfectly possible for the jury to come to the conclusion that the offence was made out.

The sole question, as it seems to this court, is whether a case was made out at the end of the case for the prosecution which called for an answer. Certain propositions are quite clear. It is quite clear, without referring to authority, that for a man to be found to have possession, actual or constructive, of goods, something more must be proved than that the goods have been found on his premises. It must be shown either, if he was absent, that on his return he has become aware of them and exercised some control over them or—and this was the case sought to be made here—that the goods had come, albeit in his absence, at his invitation or by arrangement. It is also clear that a man cannot be convicted of receiving goods of which delivery has been taken by his servant unless there is evidence that he, the employer, had given the servant authority or instructions to take the goods.

Counsel for the appellant, to whom the court is indebted for his argument, has contended in effect that there was nothing more here than the fact that the goods were found on the appellant's premises in his absence and that delivery of them had been taken by a servant. The court feels that this is undoubtedly rather a borderline case, but they have come to the clear conclusion that there was evidence in this case, and that the Deputy-Chairman was right in overruling the submission. Perhaps the matter can be put shortly by asking the rhetorical question—why did Lisle deliver these goods to this yard and take away seven empties? He was undoubtedly the thief, and one has only to think of the answer to that question to realise that there was certainly some evidence which made it more probable than not that the delivery was by arrangement with this appellant. On that short ground the court is satisfied that in this case the Deputy-Chairman was right in overruling the submission.

So far as sentence is concerned, this appellant has a record.

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He is now thirty-six years of age and he has certain convictions for larceny between 1937 and 1954. It is true that since then he has had two convictions for assault, but so far as any form of dishonesty is concerned he has kept clear for some eight years. The Deputy-Chairman took that into consideration, as he said, and imposed a sentence of eighteen months. The court is satisfied that that was a perfectly correct sentence when imposed. The trouble is that he has been on bail since August 16, 1960; in other words, he has only been in custody for about twelve days in all. The court is always anxious in such a case to take all the circumstances into consideration. Although the appellant has been on bail, he will have had the appeal hanging over him for all this time and, as we have heard, he has had to sell up his business. In all the circumstances the court feels that it would be proper to reduce the sentence of eighteen months so that he will serve in all nine months. Accordingly, the appeal against conviction is dismissed and that against sentence is allowed to the extent indicated.

Appeal against conviction dismissed.
Sentence reduced.

Solicitors: Victor Mischon & Co., for the appellant; the Solicitor, Metropolitan Police, for the Crown.

BEFORE

MR. JUSTICE GLYN-JONES, MR. JUSTICE HOWARD AND
MR. JUSTICE MEGAW

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Sentence—Preventive Detention—Motoring Offences—Principles Underlying Sentence.

Sentence of preventive detention for motoring offence affirmed.

SMITH (*ante*, p. 206; [1961] 1 W.L.R. 1046) referred to.

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While in a sentence of preventive detention there must be a punitive element, such sentence is normally for a term which exceeds that which would be appropriate as a punishment, even taking into consideration the past record of the offender, and the balance of the term is imposed not by way of punishment of the offender, but for the protection of the public against the depredations of a man who has shown by his record that he cannot be trusted with his liberty.

Appeal against sentence.

The appellant pleaded Guilty at Hampshire Quarter Sessions on June 19, 1961, to taking and driving away a motor-car without the consent of the owner and to dangerous driving and was sentenced by the Chairman (Eustace Roskill, Esq., Q.C.) to twelve months' imprisonment and eight years' preventive detention (concurrent). He was also disqualified from holding a driving licence for life.

N. R. Blaker for the appellant. The maximum sentence of imprisonment for the two offences even if consecutive terms had been imposed, would have been three years, and a sentence of eight years' preventive detention is disproportionate to that term. Further, although the appellant has an exceedingly bad record, he has never been convicted of dangerous driving or any offence relating to the driving of a motor-vehicle, and a sentence of preventive detention for an offence which the offender has never previously committed is inappropriate.

No counsel appeared for the Crown.

GLYN-JONES J.: This appellant pleaded guilty at the Quarter Sessions for the County of Hants to having on May 13, 1961, taken and driven away in the town of Basingstoke a motor-car which did not belong to him without the consent of the owner or other lawful authority. He also pleaded guilty to a count which charged him with having on the same day driven a motor-vehicle at Camberley in a manner dangerous to the public. He was sentenced to twelve months' imprisonment, the maximum, on the count for taking and driving away the motor-car without the consent of the

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owner, and to eight years' preventive detention, to be served concurrently with the sentence of twelve months' imprisonment, upon the count for dangerous driving. He was also disqualified from holding a licence to drive a motor-car for the rest of his life. He now appeals against his sentence by leave of the single judge.

His case as presented by Mr. Blaker is this: The appellant says in the grounds of appeal which he settled himself: the maximum punishment for taking and driving away a motor-car is twelve months, and the maximum punishment for dangerous driving he says, wrongly, is twelve months—in fact it is two years—but even taking it as two years, it means that the maximum sentence for the two offences would have been three years in all if consecutive sentences had been imposed, and that eight years' preventive detention is an unjust and excessive sentence, and the effect is that he is being punished again and again for his record.

Mr. Blaker adds to that this argument: The appellant has a bad record—to which I shall have to refer in greater detail—but the offences of which he has been convicted in the past do not include the offence of driving a motor-car dangerously or indeed any other form of bad driving and, says Mr. Blaker, it is inappropriate that a sentence of preventive detention should be imposed for an offence which has been committed for the first time. That, I think, accurately summarises Mr. Blaker's argument.

I am sorry to say that this appellant has an extremely bad record. He is forty-two years of age, and between 1931 and 1960 he has been convicted seventeen times. His offences include many cases of stealing motor-cars, and many cases of taking and driving away of motor-cars, but not those offences alone. There are other offences as, for example, garage-breaking, housebreaking and the like. Before 1941 he was put on probation, sent to an approved school or reform school, sent to Borstal and had various short terms of imprisonment. In 1945 he was sentenced to two years' imprisonment for stealing jewellery from an hotel bedroom and receiving property

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knowing it to have been stolen. In December 1946, at Manchester Assizes for housebreaking and larceny, two cases having been taken into consideration, he was sentenced to three years' penal servitude. It is obvious that he cannot have been more than a very short time out of prison after serving the sentence of two years before he committed the offences for which he received three years' penal servitude. He could not have been released from prison before the end of 1948, and yet by April 29, 1949, he had again reached the Manchester Assizes, and on this occasion he was convicted again of housebreaking and larceny and attempting to steal a motor-car, fourteen other cases were taken into consideration, and he received a sentence of six years' preventive detention from which he was not released until the summer of 1955. On December 20, 1955, at the Lancashire County Quarter Sessions for attempted housebreaking and housebreaking and larceny, two cases considered, he received two terms of four years and four years' imprisonment concurrent.

Again, he had not long been out of prison when once more on October 13, 1958, for stealing in a dwelling-house (two cases) and other cases considered, he received two sentences of three years and three years' imprisonment concurrent. Again he could not have been released from prison before October 1960, yet by December 28, 1960, he was before the Quarter Sessions for the County of Hants for garage-breaking and stealing a padlock and taking and driving away without consent, two cases. By that time, therefore, the appellant had plainly shown that he was either quite unable or quite unwilling to refrain from crime, and the type of crime he committed seems to have been the type which suited his desires or convenience according to the particular circumstances of the particular case. When he did appear in December 1960 before the Hampshire Quarter Sessions a hospital order was made under section 60 of the Mental Health Act, 1959, coupled with an order restricting the freedom of the hospital to discharge him without the permission of the Secretary of State under section 65, and I shall have a little more to say later about the consequences of that order.

What in fact happened was that on May 13, 1961, he walked out of the hospital in which he had been received under that order, and in the evening of that day he took a motor-car because, according to him, he needed to get back to the hospital, which was at Park Prewett, by half-past eight, and he did not think he had time to do so. Why, in those circumstances, he was found in Camberley on the A.30 main road is not explained. Certainly it was not *en route* for Park Prewett, but, having taken this motor-car, he was seen and chased by the police, and the dangerous driving he committed was driving by him in the course of fleeing from the police who, no doubt, had a desire to apprehend him for the crime he had committed. As the learned Chairman of the Hampshire Quarter Sessions said, it was only by the mercy of Providence that a terrible disaster on one of the main arterial roads of this country was avoided, and indeed, driving in the way in which he was driving, he might well have caused a terrible accident in which people might have been killed or gravely injured. As it was, he collided with a bus, turning over the car he was driving, and so badly damaging it that it could not be repaired.

It seems to us that this appellant has amply demonstrated the fact that the public are not safe from his depredations in crime unless he is in a place of safety, a place where he can be kept in safe custody. In other words, we think that this is a proper case for a sentence of preventive detention.

In the case of SMITH, *ante*, p. 206; [1961] 1 W.L.R. 1046, the court dealt with a case in which a man who had committed a whole series of motoring offences and had persistently driven again and again while disqualified from driving was sentenced by a court of quarter sessions to a term of preventive detention. It was submitted to this court on that occasion that preventive detention was a punishment never appropriate to a motoring offence. The court expressly said that that argument was not to be accepted. The court said (at p. 210): "Although the occasions on which a sentence of preventive

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detention might be properly passed for such offences must be exceedingly rare," preventive detention was not excluded as a possible sentence in an appropriate case, and doubtless such a case would arise. In the opinion of this court, such a case has arisen, and in the circumstances the sentence of preventive detention was appropriate and the court does not propose to interfere with it.

But the case requires another word or two. This appellant cannot get out of his head the idea that a sentence of preventive detention is imposed upon him as a punishment not so much for the offence which he has just committed, which is the occasion for the award, but for the offences which he has previously committed and for which he has already been punished and, taking that view of the sentence of preventive detention, it is understandable that he should feel aggrieved by it. He doubtless feels that, having been punished once, he ought not to be punished again. It is, I think, desirable that we should say that while in a sentence of preventive detention there is and must be a punitive element, the sentence normally is for a term which exceeds that which would be appropriate as a punishment even taking the past record of the offender into consideration, and the balance of a term of preventive detention beyond that part which is purely punitive is imposed not by way of punishment of the offender at all; it is imposed for the protection of the public against the depredations of the man who has demonstrated by his record that he cannot be trusted with his liberty without abusing it. Whether he cannot help committing crime or does not want to stop committing crime, in either event the public needs protection. It follows that in most cases the term of preventive detention awarded must necessarily exceed that which would be appropriate as a punishment if the punitive element alone were considered. So much for the fact that preventive detention is imposed in this case notwithstanding that the maximum punishments *qua* punishments for these offences would not exceed three years.

Another matter must be mentioned. When this appellant was sentenced to a term of six years' preventive detention, the medical authorities, I suppose the prison doctor, and I dare say he called into consultation a psychiatrist, came to the conclusion that he was mentally unstable. He was transferred to the hospital at Broadmoor as what was then called a Broadmoor patient. There he remained until the expiration of his sentence of preventive detention. On the next occasion, as I have already indicated, when he committed crime, he was sentenced to imprisonment in the ordinary way—that was in 1955—and again sent to imprisonment in 1958 and, as far as we can see from his record, those sentences were served as normal sentences of imprisonment. But when he came before the Hampshire Quarter Sessions in December 1960 the evidence of two doctors was received. One must have given oral evidence. The other may have given a written report, and their evidence was to the effect that the appellant was suffering from mental illness or psychopathic disorder or subnormality or severe subnormality, as the case may be. The court has not had the evidence given on that occasion, but presumably and probably what was said to the court was that the appellant was suffering from psychopathic disorder. The prison medical officer, who gave evidence according to a report which he seems to have made on this occasion with which we are now dealing, said that although in December 1960 he had been of opinion that some form of psychiatric treatment might benefit the offender, he had now changed his mind, and he expressed the view that he could no longer recommend or advise hospital treatment in this case. But in December 1960, faced with the evidence of those two doctors, the court of quarter sessions was uncertain what was the right way, having regard to the necessity for protecting the public, in which to deal with this offender, and the court came to the conclusion that a hospital order should be made together with a restriction order under section 65 of the Mental Health Act, 1959, the effect of which is to deprive the patient and his relations of the right to apply for his discharge and, if necessary, to carry the case to a mental health tribunal and to place in the Secretary of State the sole discretion to say when the patient, as he then became, should be released. That is the only material effect for this case of a restriction order. There are other matters which are dealt with in the statute to which I need not refer.

The Mental Health Act, 1959, is a comparatively recent statute, and no doubt as time goes on we shall all learn more of the way in which it operates, but one thing seems to be quite clear: when a hospital order is made, the person in respect of whom the order is made is received into the hospital not as a criminal, but as a patient. In this case the doctor at the hospital to which the appellant was sent, the Park Prewett Hospital, near Basingstoke, examined him and, treating him as a patient, came to the conclusion that there was very little sign of mental illness about him. If the doctor is right, the appellant is not mentally unstable; he is just wicked, and the doctor, having come to the conclusion that there was no evidence of mental instability justifying his being kept in safe custody, left him at large to go about the hospital as he thought fit and to work in the grounds outside with no physical obstacle to his walking out of the gate of the hospital at any time he liked. In due course, that is exactly what he did, he walked out of the hospital and committed the crime for which he was rightly given, as we have found, eight years' preventive detention. It may be useful if we say that it is unsafe for courts to assume that the making of a hospital order coupled with a restrictive order under section 65 is sufficient by itself to ensure that the convicted person in respect of whom such order is made will be kept in safe custody. As far as we can see, the only way in which that result can be achieved is for the court to ascertain first before making the order which mental hospital can receive the man, and further, to find out whether or not the mental hospital is one in which facilities exist for keeping patients in safe custody so that they will not have the opportunity to walk out and commit crime. There

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are such institutions, and if it be discovered that there is no vacancy in any institution in which the convicted person can be kept in safe custody, one must point out that the powers of the court to make a hospital order are permissive, not mandatory, and if the court thinks it necessary for the protection of the public that the accused man should be incarcerated, then the court should use its ordinary penal jurisdiction in order that if the prisoner needs medical treatment, arrangements may be made by the Prison Commissioners or other appropriate authority for such treatment to be given in a place where he can be kept in safe custody and the kind of thing that happened in this case avoided.

Appeal dismissed.

PRACTICE NOTE

APPEALS AGAINST SENTENCE

1961
Oct. 6

The following statement was made by

THE LORD CHIEF JUSTICE: We would like to draw attention to the fact, which is often forgotten, that the Court of Criminal Appeal have power on an appeal against sentence not merely to decrease the sentence but to increase it. The court from time to time comes across cases where in their opinion the sentence is inadequate and the court will not hesitate in appropriate cases to exercise their power to increase the sentence.

For the future, when leave to appeal against sentence is given, whether by the single judge or by his court, the order will be:

> " Leave to appeal against sentence. Legal Aid. Counsel " or " Solicitor and Counsel "

as the case may be.

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Oct. 6
PRACTICE NOTE

Neither the court nor the single judge will indicate the reasons for granting such leave. Further the court will discontinue the practice of treating the application when granted as the hearing of the appeal except in cases where counsel for the applicant is present and consents.

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